

(25,324)

20792
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 500.

FIELDS S. PENDLETON, PETITIONER,

vs.

BENNER LINE.

Writ of CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

BENNER LINE, Libellant-Appellant,
against
FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners,
Transacting Business under the Firm Name of Pendleton Brothers,
and Fields S. Pendleton, Individually, Respondents-Appellees.

RECORD ON APPEAL.

*Transcript from Record of U. S. District Court for the Southern
District of New York.*

Original.

1 United States District Court, Southern District of New York.

BENNER LINE, Libellant-Appellant,
against
FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners,
Transacting Business under the Firm Name of Pendleton Brothers,
and Fields S. Pendleton, Individually, Respondents-Appellees.

Statement.

1911.

Nov. 11. Libel filed.

Dec. 28. Answer of Edwin S. Pendleton filed.

Dec. 28. Answer and interrogatories on behalf of Fields S. Pendleton filed.

1913.

Oct. 9. Case called for trial.

Nov. 14. Opinion rendered in favor of the libellant and allowing respondent to limit liability and dismissing libel against Edwin S. Pendleton.

Nov. 29. Final Decree entered.

Dec. 3. Notice of appeal and assignments of error filed.

2

Libel.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of the Benner Line against Fields S. Pendleton and Edwin S. Pendleton, copartners transacting business under the firm name of Pendleton Brothers, and against Fields S. Pendleton, individually, in a cause of contract, civil and maritime, respectfully shows to this Honorable Court and alleges as follows:

First. Libellant is a corporation duly created, organized and ex-

isting under and by virtue of the laws of the State of New Jersey and engaged in business as a carrier between the Port of New York and ports in Porto Rico. At all the times hereinafter mentioned your libellant, as such carrier, was the bailee lawfully in possession of certain general merchandise laden on board the schooner "Edith Olcott," as hereinafter set forth.

Second. Upon information and belief, that at all the times hereinafter mentioned respondents were and they now are copartners engaged in business as ship-brokers, residing in the City of New York and having a place for the transaction of business at No. 130 Pearl Street, in the Borough of Manhattan, City and State of New York. At all the times hereinafter mentioned, the respondents were the managing owners of the schooner "Edith Olcott"; and at all such times the respondent Fields S. Pendleton was the owner, in his own right, of nine-sixteenths of the said schooner.

Third. On or about the 7th day of July, 1910, respondents chartered the said vessel unto your libellant for a voyage from the port of New York to the port of San Juan, Porto Rico, according to the terms of a certain contract of charter party then and there executed by respondents and by your libellant.

Fourth. By the terms of the said charter party, respondents warranted that said vessel should be tight, staunch, strong, and in every way fitted for such a voyage.

Fifth. Thereafter, and in pursuance of the terms of the said charter party, your libellant shipped and put on board the said schooner "Edith Olcott" certain general merchandise which it had received, in its capacity as a carrier, from various persons. A list and description of the said merchandise, together with the names of the respective consignees thereof, is hereto annexed and marked "Exhibit A." At all the times hereinafter mentioned your libellant was the bailee and person lawfully in possession of the said merchandise. On or about the 30th day of July, 1910, the said schooner "Edith Olcott," with the said cargo on board, set sail from the port of New York bound for San Juan, Porto Rico, in accordance with the said charter party. At the time of setting sail, however, the said schooner was not tight, staunch or strong, nor was she fitted for the said voyage, as required by the said charter party, but on the contrary, the pumps and machinery on the said schooner were in such a defective condition as to be practically useless and the schooner herself was in a leaking and unseaworthy condition. By reason of the defective condition of the schooner and her machinery and pumps, the said pumps were incapable of discharging enough water to keep the said schooner afloat, and in consequence thereof she sank and her entire cargo was lost.

4 Sixth. Libellant duly performed and did everything in the said charter party on its part to be performed, but by reason of the premises, libellant, as bailee of the said cargo, has suffered damages in the amount of the value of the said cargo. Libellant, as such bailee, now sues to recover the value of the property mentioned and described in Exhibit A, hereto annexed, the value of which, so

far as the same can now be ascertained, amounts to about the sum of Forty thousand (\$40,000.00) Dollars.

Seventh. The said loss and damage was not caused by any fault or neglect on the part of your libellant, but was wholly caused by the fault, negligence and breach of contract of respondents and their failure to furnish a seaworthy vessel at the beginning of the voyage, in accordance with their contract aforesaid.

Eighth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your libellant prays that a monition in due form of law, according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction, issue against the said respondents, and that they be required to appear and answer on oath all and singular the matters aforesaid and that a decree enter against the respondents and in favor of the libellant for the amount of its damages, aforesaid, with interest and costs, and that the libellant may have such other and further relief as it may be entitled to receive.

HARRINGTON, BINGHAM & ENGLAR,
Proctors for Libellant.

64 Wall Street, Borough of Manhattan, New York City.

5 STATE OF NEW YORK,
County of New York, ss:

Charles W. Pinkney, being duly sworn, deposes and says that he is the Treasurer of the Benner Line, the libellant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is not made by the libellant is that the libellant is a corporation.

BENNER LINE,
By CHARLES W. PINKNEY, *Treasurer.*
CHARLES W. PINKNEY.

Sworn to before me this 19th day of October, 1911.

OLIVE A. BILLARD,
Notary Public.

New York County, No. 299.

EXHIBIT A.

General Merchandise Lost with the Schooner "Edith Olcott."

Shipment.	Consignee.
1 piece tubular boiler.....	Cintron & Aboy
1 piece steam drum.....	do.
130 pieces 16 ft. boiler tubes.....	do.
121 bbls. fire brick.....	do.

4045	pes. & Pkgs. railway car and track material	The Gregg Co. Ltd.
1000	rails	do.
515	rolls barb wire	U. S. Steel Products Export Co.
110	cases wire nails	do.
250	bundles galvanized corrugated iron	do.

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3000	bbls. Portland Cement	Mullenhorf & Korber
17	pkgs. comprising one locomotive	do.
60	kegs. railroad spikes	do.
29	pkgs. chairs and furniture	Arroyo & Montero
18	cases chairs	Heywood Bros. & Wakefield Co.
75	bbls. earthenware	Finlay Bros. & Waymouth Trad. Co.
24	cases enameled tinware	Sres F. Ortega & Co.
6	crates enameled tinware	do.
20	cases gun powder	do.
20	bbls. lump chalk	do.
10	bbls Spanish white	do.
10	bbls. plaster	do.
19170	fire bricks	Central Eureka
31	crates tiles	do.
20	bbls. mortar	do.
2000	bbls. cement	Fritz Lundt & Co.
70	boards	Sobrinhas de Ezquiaga
362	bbls. white pine lumber	do.
1237	pieces white pine lumber	Moral & Co.
60	drums gasoline	H. V. Grosch
2	boxes iron filters	H. W. St. John & Co.
1	box stones	do.
190	bbls. hollow ware	Sucs de M. Lomba y Cia
545	bbls. bowls	do.
250	fire carriers	do.

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Answer of Edwin S. Pendleton.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The separate answer of Edwin S. Pendleton to the Libel and Complaint of the Benner Line against said Edwin S. Pendleton, impleaded with Fields S. Pendleton, in a cause of contract, civil and maritime, respectfully shows to this Court, as follows:

First. Respondent has no information as to the truth of the allegations of the First Article of the libel and leaves the libellant to make such proof thereof as it may be advised.

Second. Respondent admits that he and Fields S. Pendleton were copartners engaged in business as shipbrokers as alleged in the Second Paragraph of the libel. He denies that he was one of the managing owners of the Schooner "Edith Olcott," or had any in-

terest therein other than as agent for owners. He admits the ownership of Fields S. Pendleton.

Third. This respondent in answer to the third article of said libel denies that the respondents therein mentioned chartered said schooner unto the libellant for a voyage from the Port of New York to the port of San Juan, Porto Rico, although he admits that said firm of Pendleton Brothers, acting as the agents of the owners of said schooner, did, on the seventh day of July, 1910, on behalf of such owners, charter said schooner to the libellant for the voyage alleged in said third article.

Fourth. The respondent admits that under the terms of said charter party it was covenanted and agreed that said vessel should be tight, staunch, strong, and in every way fitted for such voyage, but he denies that the respondents named in said libel made
8 any warranty to that effect, other than as the agents for the owners of said vessel.

Fifth. He has no knowledge as to the merchandise shipped on board or the capacity of the libellant and leaves the libellant to make such proof thereof as it may be advised. He admits that on or about July 30th, 1910, the schooner sailed as alleged; he denies the allegations as to the unseaworthiness or defective condition of the schooner.

Sixth. Respondent denies the allegations of the Sixth, Seventh and Eighth Articles of the libel, except that he admits performance by the libellant as charterer and the jurisdiction of the court.

Seventh. Further answering this respondent alleges that he had no interest in the vessel but that merely as a member of the firm of Pendleton Brothers he acted in the capacity of a broker in effecting a charter of the vessel.

Eighth. Further answering this respondent alleges that the loss mentioned in the libel occurred without the privity or knowledge of the owners of said schooner and that they exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied.

Ninth. That all and singular the premises are true.

Wherefore the respondent asks that the libel herein be dismissed with costs.

EDWIN S. PENDLETON.

Sworn to before me, this 27th day of December, 1911.

JNO. B. MCCARTHY,
Notary Public, N. Y. County.

HENRY W. GOODRICH,

Proctor for Respondent Edwin S. Pendleton.

49 Wall Street, New York City.

9 *Answer of Fields S. Pendleton.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The separate Answer of Fields S. Pendleton to the Libel and Com-

plaint of the Benner Line against said Fields S. Pendleton, impleaded with Edwin S. Pendleton, in a cause of contract, civil and maritime, respectfully shows to this Court, as follows:

First. This respondent, answering the allegations of the first article of said libel, admits that the libellant is a carrier, but he denies that the libellant was the bailee lawfully in possession of the merchandise laden on board of said schooner "Edith Olcott," as therein alleged, and he leaves the libellant to make such proof thereof as it may be advised is necessary or essential.

Second. In answer to the allegations of the second article of said libel, this respondent admits that at the times therein alleged he was the owner of nine-sixteenths of the schooner "Edith Olcott," and he also admits that he and said Edwin S. Pendleton were at said times, and now are, copartners in the ship brokerage business, as therein alleged, but he denies that said copartnership was the managing owner of said schooner.

Third. This respondent in answer to the third article of said libel denies that the respondents therein mentioned chartered said schooner unto the libellant for a voyage from the Port of New York to the Port of San Juan, Porto Rico, although he admits that said firm of Pendleton Brothers, acting as the agents of the owners of said schooner, did, on the seventh day of July, 1910, on behalf of such owners, charter said schooner to the libellant for the voyage alleged in said third article.

Fourth. The respondent admits that under the terms of said charter party it was covenanted and agreed that said vessel should be tight, staunch, strong, and in every way fitted for such voyage, but he denies that the respondents named in said libel made any warranty to that effect, other than as agents for the owners of said vessel.

Fifth. This respondent, answering the allegations of the fifth article of said libel, admits that certain merchandise was received on board said vessel from the libellant under the terms of said charter party for delivery at Porto Rican ports, and that said vessel thereafter sailed on said voyage, but he denies that the libellant in its capacity as carrier was the bailee and the person in lawful possession of said merchandise as therein alleged; and he also denies each of the other allegations in said libel respecting the condition of said vessel, her pumps and machinery, or that the loss of said vessel was occasioned as therein alleged, but whether the list and description of said merchandise together with the names of the respective consignees thereof, as stated in said Exhibit A annexed to said libel is correct, this respondent has no knowledge, and leaves the libellant to make such proof thereof as it may be advised is necessary or essential.

Sixth. The respondent in answer to the allegations of the sixth article of said libel admits that the libellant as such charterer has performed its part of said charter party, but he denies that the libellant was in fact the bailee of said cargo, or as such bailee, or otherwise has suffered damage on account of the loss of said cargo, or that the libellant by reason of the premises stated in said

11 sixth article, has a right to sue the respondents to recover the value of the property therein, mentioned; and he further denies that the value of said property amounts to about the sum of Forty Thousand Dollars (\$40,000) as alleged therein.

Seventh. The respondent in answer to the seventh article of said libel admits that the loss of said schooner "Edith Olcott" occurred without any fault or neglect on the part of the libellant; but he denies that the libellant has suffered any loss or damage as therein alleged, and avers that if any such loss or damage did occur, it was not due to any breach of contract on the part of the respondents named in said libel, or either of them, to furnish a seaworthy vessel as therein alleged, and such loss was without any fault or neglect on the part of this respondent.

Eighth. This respondent in answer to the eighth article of said libel denies that all and singular the premises are true as therein alleged, although he admits the jurisdiction of this Honorable Court in the premises.

Ninth. This respondent for further answer to said libel alleges that on the seventh day of July, 1910, the date of the execution of the charter party referred to in said libel, he was the owner of nine-sixteenths of said schooner "Edith Olcott," a four-masted schooner of the burden of 1,194 gross tons, and at said time said vessel was tight, staunch, strong and in every respect seaworthy and suitable for a voyage such as that referred to in said libel; and on said seventh day of July said co-partnership of Pendleton Brothers, composed of this respondent and Edwin S. Pendleton, acting as agents for the owners

12 of said schooner, agreed with the libellant upon the freighting and chartering of said vessel for the voyage referred to in said libel, upon the terms and conditions stated in said charter party, as will more fully appear by a copy thereof hereto attached and made a part hereof, and to which this respondent for greater certainty begs leave to refer.

Tenth. That immediately after the execution of said charter party, and prior to the time said schooner entered upon the performance thereof, this respondent gave orders that said schooner should be taken into a dry dock, so that her bottom could be carefully examined and painted, and such other repairs as might appear proper could be made; and thereupon said schooner was received into a dock where her bottom was examined, cleaned and painted, and caulked where required, and some further repairs were made to said vessel at an expense of about Seven hundred dollars; and when such repairs were completed, said vessel was in A-1 condition; and thereafter said schooner under the direction of the libellant received on board such merchandise as it desired to ship, for which bills of lading were given, in and by which said vessel was to make delivery of said cargo at certain Porto Rican ports therein named, the dangers of the sea excepted, and certain other exceptions, all of which will more fully appear by the terms and conditions of said bills of lading, the printed form of which is hereto attached and made a part hereof, and to which for greater certainty this respondent begs leave to refer.

Eleventh. That thereafter on the thirtieth day of said July said

schooner, then being in charge of a thoroughly competent and experienced master mariner, with a full crew, and then being in every respect tight, staunch, strong, well found and fully equipped,
13 set sail on said voyage, and thereafter continued in the prosecution thereof until about the third day of August, when said schooner had reached a point about five hundred miles southeast by east from Sandy Hook in Latitude 37 degrees 3", longitude 65 degrees 30" west, when said schooner encountered perils of the sea, among other things, a very heavy wind and heavy sea so that said vessel labored heavily, and such conditions continued until the morning of the fifth day of said August, during which time said schooner became greatly strained, causing her to leak, and said vessel's steam and hand pumps were started and continued to be operated, but, owing to the serious strain which said vessel had sustained, it was found that said pumps would not keep her free, and the master of said schooner on the sixth day of said August set signals of distress, hoping to obtain assistance in order to be towed into port.

Twelfth. That at about ten o'clock in the forenoon of said sixth day of August, the British Steamer "King Edgar" bound for New York sighted the "Edith Oleott," and bore down towards her, and thereupon the captain of said schooner requested to be towed into New York, and agreed with the master of said steamship upon the terms for such employment; and at about 4.30 the same afternoon said steamship sent a tow line aboard of said schooner, and shortly after started with her in tow towards New York; and such towage continued until about 4.30 the next morning, when, owing to the fact that said schooner was plunging into the heavy seas and shipping great quantities of water, the hawser parted, and as the water was rapidly gaining in said schooner's hold, she listed badly to starboard and settled heavily forward; and thereupon the master of said
14 schooner and the master of said steamship concluded that it was impossible to longer tow her, so that the master and crew of said schooner were compelled to abandon her and seek refuge upon said steamship, and they were later brought into the Port of New York; and that very soon after such abandonment, said schooner foundered and became a total loss with all the cargo on board.

Thirteenth. And this respondent further alleges that the loss of said schooner and said cargo were caused by the perils of the sea, and without any fault or neglect on his part.

Fourteenth. This respondent further answering said libel says that before and at the commencement of the voyage he exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, and that if it shall in any way appear that the said vessel was not seaworthy at the commencement of the voyage or thereafter, that such unseaworthiness was without his privity or knowledge, and under the laws of the United States relating to limitation of liability on the part of vessel owners, he is relieved of all liability growing out of the loss of said schooner; and if any liability on the part of this respondent does exist, it is limited to his proportionate part in said schooner as hereinbefore stated.

Fifteenth. That all and singular the premises are true.

Wherefore, the respondent prays that the libellant may be required to answer the interrogatories hereto subjoined, and that said libel may be dismissed with costs.

HENRY W. GOODRICH,

Proctor for Respondent Fields S. Pendleton.

49 Wall Street, New York City.

15 SOUTHERN DISTRICT OF NEW YORK, ss:

Fields S. Pendleton, being duly sworn, deposes and says that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

FIELDS S. PENDLETON.

Sworn to before me, this 27th day of December, 1911.

[SEAL.]

JNO. B. McCARTHY,

Notary Public, N. Y. County.

Interrogatories Referred to in the Foregoing Answer to be Answered by the Libellant under Oath.

First Interrogatory. State the names of the managing officers of the plaintiff corporation, and how long each of them has been so engaged.

Second Interrogatory. State by whom on behalf of the libellant the charter party referred to in the libel was negotiated.

Third Interrogatory. State how long the person negotiated such charter party on behalf of the Benner Line has known the firm of Pendleton Brothers.

Fourth Interrogatory. State whether or not the person referred to in the preceding interrogatory knew or understood at the date of such charter party, that Pendleton Brothers were negotiating and thereafter executed the same as the agents of the owners of said vessel, and not as principals; and, if you answer in the negative, state what was the understanding of the person referred to by the use of the word "agents" in the second line of said charter party.

16 Fifth Interrogatory. State how long the Benner Line has been engaged in forwarding goods between the Port of New York, and the Gulf, Cuban and Porto Rican ports.

Sixth Interrogatory. State whether the libellant at the time of entering into the charter party referred to in said libel did so with the intention of receiving shipments of goods from various parties to be forwarded to the Gulf, Cuban and Porto Rican ports; and, if you answer in the affirmative, state whether, upon the receipt by said Benner Line of such goods, it—issued—its own bills of lading therefor; and, if you also answer the latter inquiry in the affirmative, produce and annex to your answer to this interrogatory a copy of the form of the bill of lading issued, showing the terms and conditions under which such shipments were received by said Benner Line

and loaded on board said Schooner "Edith Olcott"; and also state whether all the other shipments on said vessel were made under similar contracts; and, if you answer in the negative, state in what particular the other shipping contracts varied from the copy so produced.

Seventh Interrogatory. State whether said Benner Line has any further or other interests in said shipments on said schooner, other than that stated in said libel; and, if you answer in the affirmative, state fully what such interests were at the date of the filing of said libel.

Eighth Interrogatory. State the name of each of the shippers of goods on said schooner on said voyage, and the character and value of said shipments, so far as it is within the libellant's knowledge.

Ninth Interrogatory. State the name of each of said shippers who have authorized or requested the filing of the present libel by the Benner Line; and, if such authorization is in writing, annex a copy thereof to your answer to this interrogatory, and, if such authorization is oral, state where, when, and by whom such oral authorization was made, and fully the terms thereof.

Tenth Interrogatory. State from whom among such shippers the Benner Line collected freight on such shipments, and to whom and in what amounts such freight has been repaid by said Benner Line to such shippers.

Eleventh Interrogatory. State whether at or about the time of entering into said charter party, or at any time thereafter, up to the time of said schooner's departure on said voyage, any one representing the Benner Line made any examination or inspection of said vessel for the purpose of ascertaining her condition; and, if you answer in the affirmative, state when and by whom such examination was made, what experience such person had had in such work; where said schooner was at the time, and the information or report furnished to said Benner Line of the result of such examination.

Twelfth Interrogatory. Did you directly or through agents make application to insurance companies for insurance on the cargo or freight of the "Edith Olcott"? If so, produce your application book or slips containing the binding of the risk. How did the rate of such insurances compare with the rate of insurances on other vessels upon the cargo or freight of which you applied for insurance, and which vessels were younger than the "Edith Olcott," covering risks or insuring risks at a similar time of the year as the "Edith Olcott" insurance, if any?

Thirteenth Interrogatory. State whether said Benner Line
18 at any time prior to or subsequent to the entering into said charter party received any report or information from any inspector or from any other person or persons, who had examined or inspected said vessel; and if you answer in the affirmative, state the names of such inspectors or persons making the examination, and what information said Benner Line received on the subject.

Fourteenth Interrogatory. State in what particulars it is claimed on behalf of the libellant that said schooner "Edith Olcott" was not

in a tight, staunch, strong and seaworthy condition at the time she sailed on the voyage referred to in said libel.

Fifteenth Interrogatory. State in what particulars it is claimed on behalf of the libellant that said vessel's pumps were insufficient and unsuitable for a vessel of her class.

Sixteenth Interrogatory. State whether the Benner Line claims to be the bailee of the cargo on said schooner solely in consequence of the issuance of the bills of lading referred to in Interrogatory 6; and, if you answer in the negative, state on what other grounds, if any, it claims to be such bailee.

Pendleton Brothers.

Ship Brokers and Commission Merchants, 130-132 Pearl Street,
New York.

This Charter Party, made and concluded upon in the City of New York, the 7th day of July, 1910, between Pendleton Bros., agents of the schooner, "Edith Olcott," of New York, of the burthen of 985 tons or thereabouts, register measurement, now lying in the harbor of Perth Amboy of the first part, and The Benner Line of the second part, Witnesseth, that the said party of the first part agrees in the freighting and chartering of the said vessel, including deck (with the exception of the cabin and necessary room for the crew and storage of provisions and sails,) unto said party of the second part, for the voyage from New York to San Juan, Porto Rico. Charterers have privilege of sending vessel to a second part to finish discharging, viz., either Mayaguez, Jajardo,, Ponce, Guanica, Jabos or Guayanilla, on the terms following. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the lawful merchandise hereinafter mentioned. The said party of the second part to finish discharging, vi., either Mayaguez, Fajardo, and complete cargo of ordinary lawful merchandise under and on deck, of not exceeding seventeen hundred tons dead weight Charterers have privilege of shipping powder and dynamite under deck and calcium carbide in iron drums, and acid in carboys on deck. Also option of shipping one boiler under deck, weight of which is not over nine tons. The bills of lading to be signed without prejudice to this Charter, and to pay \$3,500 dollars for the use of said vessel during the voyage aforesaid, thirty-five hundred dollars, \$3500 lump sum for the voyage, payable in U. S. gold or its equivalent and pay stevedore bill for loading, clerk hire and wharfage while loading. Also all port charges at Porto Rican ports, including lighterage, pilotage, wharfage, etc.

Vessel to be free of wharfage. It is agreed that the lay days for loading and discharging shall be as follows (if not sooner despatched), commencing from the time the vessel is ready to receive or discharge cargo. Fifteen running days, Sundays and holidays excepted shall be allowed for loading. Charterers have privilege of three additional days at thirty dollars

per day. Discharging cargo to be received as fast as master can deliver in suitable hours and weather, and that for each and every day's detention by default of the said party of the second part, or agent, Ninety-nine \$99.00 dollars per day, day by day, shall be paid by said party of the second part or agent, to the said party of the first part or agent. The cargo or cargoes to be received and delivered alongside, within reach of the vessel's tackles. Vessel to move to such loading and discharging berth as charterer may direct where she can always lie safely afloat.

Vessel's lay days to commence July 14th.

It is agreed that the master and owners shall have an absolute lien on the cargo for freight, dead freight and demurrage. The dangers of the seas and navigation excepted.

A commission of five per cent. upon gross amount of this Charter and Demurrage, payable by the vessel due Pendleton Brothers, upon the signing thereof.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs and executors, administrators and assigns, and also the said vessel's freight, tackle appurtenances and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of charter.

In witness whereof, we hereunto set our hands the day and year first above written.

Signed in the presence of
(Signed)

PENDLETON BROTHERS.
BENNER LINE.
C. H. CALLAHAN, *Sec'y.*

21 We do hereby certify this to be a correct copy of the original charter. Partly in our possession.
(Signed) PENDLETON BROS.

Gross Weight of each Entry must be specified on this Bill of Lading in Pounds.

N. A. Benner & Co., Inc., Gen. Agents, 82 Beaver Street, N. Y.

(Cut of Four Mast Sailing Ship.)

Sobrinos de Ezquiaga, Agents, San Juan.

Benner Line,

Gulf, Cuban and Porto Rico Ports,
New York to San Juan, Porto Rico.

Shipped in apparent good order by ——— on board the good —, now lying in the Port of New York and bound for San Juan, to say:

Marks and Numbers —.

Number and Class of Packages and Contents, —.

Value, —.

Gross weight, —.

Weight, quantity, contents, condition of contents and value unknown.

Not responsible for breakage, leakage, dentage or condition of contents.

22 Any fines imposed on vessel on account of the contents and weight of packages not being properly expressed on this Bill of Lading will be for account of shippers and consignees.

Charges, —.

Ins. Prem., —.

Freight, —.

Primage, —.

Total, —.

to be conveyed upon the said vessel unto the aforesaid Port of San Juan, and there in like order and condition to be delivered within reach of vessel's tackles unto ——— or his, or their assigns, upon the payment by him, or them, of vessel's freight and charges, in U. S. gold, as above, primage and average accustomed. It is especially understood and agreed, that the agreements or provisions expressed on the back hereof numbered from 1 to 19, each and every one thereof shall be deemed to be part and parcel of this contract of affreightment, the same as if appearing directly on the face hereof, and the said goods are shipped and received subject to same.

In witness whereof, the Agent of said vessel hath signed — Bills of Lading, all of this tenor and date, one whereof being accomplished, the others to stand void.

Dated at New York this — day of —, 191—.

1. It is mutually agreed that the ship shall have liberty to sail without pilots, to tow and assist vessels in all situations, to transship goods by any other vessel or vessels and to touch at any port or ports for whatever purpose, and to deviate for the purpose of saving life or property.

2. It is also mutually agreed that the carrier shall not be liable for loss or damage, occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause or wheresoever occurring, by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of governments or people, riots, strikes or stoppage of labor, by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, by collisions, stranding or other accidents in navigation of whatsoever kind; or, if the owner shall exercise due diligence to have the vessel in all respects seaworthy and properly manned, equipped and supplied, for damage or loss resulting from faults or errors in navigation or in the management of said vessel.

3. It is also mutually agreed that the carrier shall not be liable for loss by leakage or damage incident to the transportation of butter, lard, oils, grease, tallow, etc., or similar goods; nor for weight, leak-

age, breakage, shrinkage, rust, loss or damage from insecurity of packages, inaccuracy, or omissions in marks, numbers, address or description, effects of climate or decay, sweating, heat of holds, vermin, rain or spray, nor for articles perishable in their nature, or from unavoidable detention or delay in the voyage, nor for land damage, risk of craft, hulk or transshipment, injury to or soiling of wrappers or packages, however caused, or from stowage or contact with, or smell, or evaporation, or taint from other goods, explosion or fire at sea or in port, in craft or on shore.

4. Also, that the carrier shall not be liable for, and the shipper shall not demand any greater sum than one hundred dollars (\$100) for loss or damage to, or delay in delivery of any one package, each package being represented by the shipper as being of no greater value than that sum, unless a greater value is stated by the shipper and a bill of lading given therefor stating such greater value.

5. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, and such goods may be thrown overboard or destroyed at any time without compensation.

6. Also, that any duty, tax or fine of whatever nature, imposed upon the vessel by the authorities at the port of discharge, for or in connection with the goods herein described, caused by incorrect or insufficient marking or description of contents, or weight or any other particulars required by such authorities, or otherwise howsoever, shall be paid by consignee of the goods before delivery. And in case of agent of carrier being unable to collect said duty, tax or fine from said consignee, then the shipper shall be liable to the carrier for any such duty, tax or fine.

7. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses incurred with respect to the goods in consequence of such quarantine, or any transportation or handling necessary to effect such discharge, shall be a lien upon the goods.

8. Also, the agent of the vessel has the option of hiring lighters at the port of destination for the landing of the within goods, at the expense and risk of the owners of said goods, and of depositing the same at the expense of the consignee, and at his risk of fire, loss or injury in warehouse, wharf or custom house, or permitting them to lay where landed as the authorities of the port of discharge shall direct, and when so landed or deposited to be subject to storage, wharfage and other charges as customary. If by reason of the want or impossibility of obtaining lighters, in the agent's opinion the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, she will be at liberty to proceed on her voyage with the whole or any portion of the within goods remaining on board and to forward them to destination from the first convenient port at which she may subsequently call, at the risk and expense of the consignees, and the

Company shall not be responsible for damage or loss as the consequence thereof. It is further stipulated that if the vessel discharge at wharf, consignees are to receive cargo there.

9. Also, in the event of the vessel being prevented by blockade or the hostile act of any power, from reaching her destined port, the master to have the option of landing the cargo at any other port or place which he may consider safe, at shipper's risk and expense, the master and owners being thenceforth discharged from all responsibility.

10. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

11. Also, that in the event of claims for damages or short delivery, the claim shall not exceed the invoice cost of the goods when shipped, and the carrier has the option of replacing the goods at his expense. Notice of any claim arising under this bill of lading must be given by the consignee to the Company's agent at the port of destination,

26 within forty-eight hours after the landing of or failure to deliver the goods. And in case such claim, whatever it may be, shall not be preferred within the time and at the place designated, all claims for such loss or damage shall be deemed to be waived and the vessel and the owners thereof shall be discharged therefrom.

12. Also, it is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by the said goods or any part thereof, for which the carrier shall be liable to the shipper or consignee, the carrier shall have the full benefit of any insurance that may have been effected upon or on account of the said goods.

13. Also, in case any part of the goods cannot be found for delivery during the vessel's stay at the port of destination, they are to be forwarded by first opportunity when found, at the vessel's expense, the vessel not to be held liable for any claim for delay or otherwise.

14. Also, in case the surf or state of the weather upon the arrival of the vessel shall be such as to render it, in the master's opinion, impracticable to land the goods at the port to which they are destined, they may be retained on board until her return trip, or may be transferred to another vessel, or landed at some other port for transshipment to destination at the risk and expense of the owner or consignee of the goods.

15. Also, that the carrier shall have the liberty before shipment, or at any period of the voyage, to ship the whole or part by any other vessel, or transship and land and store, or put into hulk or craft for such time as may be deemed expedient and thence transship by any other vessel, to the final port.

27 16. Also, that prepaid freight shall not in any event be subject to reclamation, goods lost or not lost, and in all cases full freight is payable on damaged or unsold goods.

17. Also, should actual weight exceed weight given by shipper, carrier's agent is to have option to charge freight on actual weight.

18. Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by fire and/or flood

not happening through the fault or negligence of the owner, master, agent or manager of the vessel.

19. It is also mutually agreed, that nothing herein shall be construed to exempt the vessel, its owners, master, or the agents, or manager from any liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of said goods, and that this shipment is subject to the terms and provisions of the Act of Congress of the United States, approved on the 13th day of February, 1893.

And finally in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all its stipulations and conditions, whether written, printed or stamped, as fully as if they were all signed by such shipper, owner, consignee or holder.

No bill of lading is signed for a less sum than \$1.50.

28

Exceptions to Interrogatories and Notice.

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON et al., Respondents.

SIR: Please take notice, that the libellant herein excepts to the interrogatories annexed to the answer of the respondent Fields S. Pendleton, on the ground that the same do not touch any matters charged in the libel or any matter of defence set up in the answer; and upon the further ground that said respondent Fields S. Pendleton is not entitled, under the law or practice of the above court to obtain, by means of interrogatories, the information therein sought to be obtained; and upon the further ground that the said interrogatories require the production of documents and seek to compel the libellant to disclose its evidence in advance of trial; and as to interrogatories numbered Second, Fourteenth and Fifteenth upon the further ground that they relate to matters obviously within the knowledge of the respondents.

Dated, New York, January 2, 1912.

Yours, Etc.,

HARRINGTON, BIGHAM & ENGLAR,

Proctors for Libellant,

64 Wall Street, New York City.

To Henry W. Goodrich, Esq., Proctor for Respondent, Fields S. Pendleton.

29

Notice of Exceptions.

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON et al., Respondents.

SIR: Please take notice, that the foregoing exceptions to the inter-

rogatories annexed to the answer of Fields S. Pendleton herein, will be brought on for hearing before the above court on the 9th day of January, 1912, upon the opening of court on that date.

Dated, New York, January 2, 1912.

Yours, Etc.,

HARRINGTON, BIGHAM & ENGLAR,

Proctors for Libellant,

64 Wall Street, New York City.

To Henry W. Goodrich, Esq., Proctor for Respondent, Fields S. Pendleton.

30 *Memorandum on Exceptions to Interrogatories.*

United States District Court, Southern District of New York.

BENNER LINE

against

FIELDS S. PENDLETON et al.

Exceptions to Interrogatories Propounded by Respondent.

Mr. Englar for the exceptions and libellant;

Mr. Goodrich opposed.

Memorandum.

These interrogatories are drawn as in accordance with Rule 32 in Admiralty of the Supreme Court. Let it be assumed (for the sake of argument) that the questions complained of go somewhat beyond the scope of interrogatories under Rule 32 as ordinarily used in practice in this Court.

This, however, is no reason why the practice in this District should not expand in accordance with well-considered decisions in other Courts of Admiralty.

In my judgment the opinion of Judge Dodge in the Baker Palmer, 172 Fed. Rep., 154, well sums up the result of numerous cases and indicates a marked advance in the treatment of the subject.

It was a feeling that interrogatories or some equivalent for them should be or could be more widely used than hitherto had been the case in this Court, which led to the passage of recent Rules in Admiralty Nos. 38 and 39. Even though this defendant has not
31 proceeded under these local Rules, Rule 32 of the Supreme Court is to be interpreted in the spirit manifested by our own recent amendments to practice.

It follows that the test of the propriety of an interrogatory is whether it tends to elicit any information which will throw light upon the controversy as revealed by the pleadings without compelling the person interrogated to divulge information which would tell the witnesses of the interrogating party exactly what to swear to.

It is frequently very desirable for the advocate to know beforehand what his witnesses will have to meet; yet in many cases this knowledge must be denied, for of course he would communicate what he had learned through interrogatories to his clients and the temptation would sometimes be too great.

I have carefully scanned these interrogatories, and while it is true that answers to some of them may destroy the libellant's case, no possible answer that I can imagine will put a premium on hard swearing by the defence.

As to the materiality of the information demanded the question comes down to this: Libellant sues as a charterer in respect of respondents and as a bailee in his relations with certain shippers, and the gravamen of his action is the unseaworthiness of the chartered ship.

It is right that a libellant should state all the information acquired before voyage begun in respect of the probable seaworthiness or unseaworthiness of the vessel; also the extent of the knowledge of its own agent in the transaction as to the terms of the chartering including the capacity or official position of the charterers; also the nature of the relations between itself and its shippers out of which relations it is alleged a bailment grew.

No question is asked that would not be material upon the
32 trial to illuminate one or the other of these propositions.

The objections to the interrogatories are overruled, and it is directed that they be answered within ten days from the date of an order upon this motion.

Jan. 24, 1912.

Order Overruling Exceptions to Interrogatories.

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the Court-rooms in the Post Office Building in the City of New York on the 25th Day of January, 1912.

Present: Hon. Charles M. Hough, District Judge.

BENNER LINE

VS.

FIELDS S. PENDLETON et al.

The respondent, Fields S. Pendleton, having filed with his answers, interrogatories addressed to the libellant; libellant having excepted thereto, and a hearing having been had upon said exceptions,

Now, on motion of Henry W. Goodrich, Proctor for the Respondent, Fields S. Pendleton, it is

Ordered, that said exceptions be overruled and that the libellant answer said interrogatories under oath within ten days from the date of this order.

C. M. HOUGH, D. J.

33

Answer- to Interrogatories.

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against.

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Trans-
acting Business under the Firm Name of Pendleton Brothers, and
Fields S. Pendleton, Individually, Respondents.

Answers to Interrogatories.

The libellant, Benner Line, answers the interrogatories annexed
to the separate answer of Fields S. Pendleton, as follows:

Answer to First Interrogatory.

The managing officers of the libellant corporation are Cornelius
H. Callaghan, Secretary, and Charles W. Pinkney, Treasurer. Each
of these officers has held his office since June 24, 1910.

Answer to Second Interrogatory.

The charter party referred to in the libel was negotiated on behalf
of the libellant by its Secretary, Cornelius H. Callaghan.

Answer to Third Interrogatory.

The said Cornelius H. Callaghan has known the firm of Pendleton
Brothers since the said firm was formed.

34 *Answer to Fourth Interrogatory.*

The said Cornelius H. Callaghan had no information at the date
of such charter party as to whether Pendleton Brothers negotiated
and executed the said charter party as agents or principals, except
such information as was contained in the language of the charter
party itself.

Answer to Fifth Interrogatory.

Libellant, Benner Line, has been engaged in forwarding goods
between the port of New York and Gulf, Cuban and Porto Rican
ports since its incorporation on May 1st, 1909.

Answer to Sixth Interrogatory.

At the time of entering into the said charter party the libellant
did so with the intention of receiving goods from various parties
to be forwarded to Porto Rican ports, but not to Gulf or Cuban

ports. Upon receipt of such goods libellant furnished its bills of lading which were signed by the Master or agents of the said vessel. All of the said bills of lading were in the form annexed to the separate answer filed by the respondent, Fields S. Pendleton, herein.

Answer to Seventh Interrogatory.

In addition to the interest set forth in the libel, the libellant was the actual shipper of a portion of the cargo in respect of which the libel herein was filed. The nominal shipper of this portion of the cargo was Lawrence Oettinger, but the actual shipper and the person interested in such shipments was your libellant. The shipments in question were as follows:

- 362 Bundles white pine lumber, said to contain 31901 ft.
 - 45 pine boards, said to contain 720 ft.
- 35 25 pine boards, said to contain 334 ft.
 - 620 pieces white pine lumber, said to contain 9013 ft.
- 616 pieces white pine lumber, said to contain 8959 ft.

Answer to Eighth Interrogatory.

Libellant annexes hereto, marked "Exhibit A," a list of the persons who shipped goods on the schooner "Edith Oleott" on the voyage referred to in the libel, and annexed also, marked "Exhibit B," a copy of the ship's manifest, which contains all the information in libellant's possession with respect to the character and value of the said shipments.

Answer to Ninth Interrogatory.

Libellant has not directly received any request or authority to bring this suit from any of the shippers, except in so far as libellant is itself one of the shippers. As to the shipments in which libellant is not personally interested, the present suit has been requested by underwriters whom libellant understands to be duly authorized to take such action by the shippers or consignees.

Answer to Tenth Interrogatory.

Libellant collected freight from all of the shippers mentioned in the annexed list marked "Exhibit A," excepting the U. S. Steel Products Export Company, the North American Trading Company and the Lawrence Cement Company. None of such freight has been repaid by the libellant to the said shippers.

Answer to Eleventh Interrogatory.

Libellant answers this interrogatory "No."

36

Answer to Twelfth Interrogatory.

Libellant made application through its agents to the Atlantic Mutual Insurance Company and the Providence-Washington Insurance Company for insurance on a small portion of the cargo of the "Edith Olcott." This insurance was procured at the usual rates. Libellant has no application book or slips relating to the insurance with the Providence-Washington Insurance Company, but annexes hereto, marked "Exhibit C," a copy of the entry in its application book relating to the insurance with the Atlantic Mutual Insurance Company.

Answer to Thirteenth Interrogatory.

Libellant answers this interrogatory "No."

Answer to Fourteenth Interrogatory.

Libellant is unable to give all the particulars in which the said schooner was unseaworthy at the time she sailed, but claims upon information that her pumps were so defective and out of repair as to be useless and that in this particular the vessel was unseaworthy.

Answer to Fifteenth Interrogatory.

Upon information libellant claims that the pumps of the "Edith Olcott" were rusted, out of repair, insufficiently packed and wholly unfit for use.

Answer to Sixteenth Interrogatory.

Libellant claims to be the bailee of the cargo in consequence of the fact that the vessel on which the said goods were carried was chartered by the libellant for the purpose of carrying the said goods which were solicited by libellant.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant, 64 Wall Street, New York City.

37 STATE OF NEW YORK,
County of New York, ss:

Cornelius H. Callaghan, being duly sworn, deposes and says that he is Secretary of Benner Line, the libellant herein; that he has read the foregoing answers to interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief. That the reason this verification is not made by libellant is that libellant is a corporation.

CORNELIUS H. CALLAGHAN.

Sworn to before me this 13th day of February, 1912.

[SEAL.]

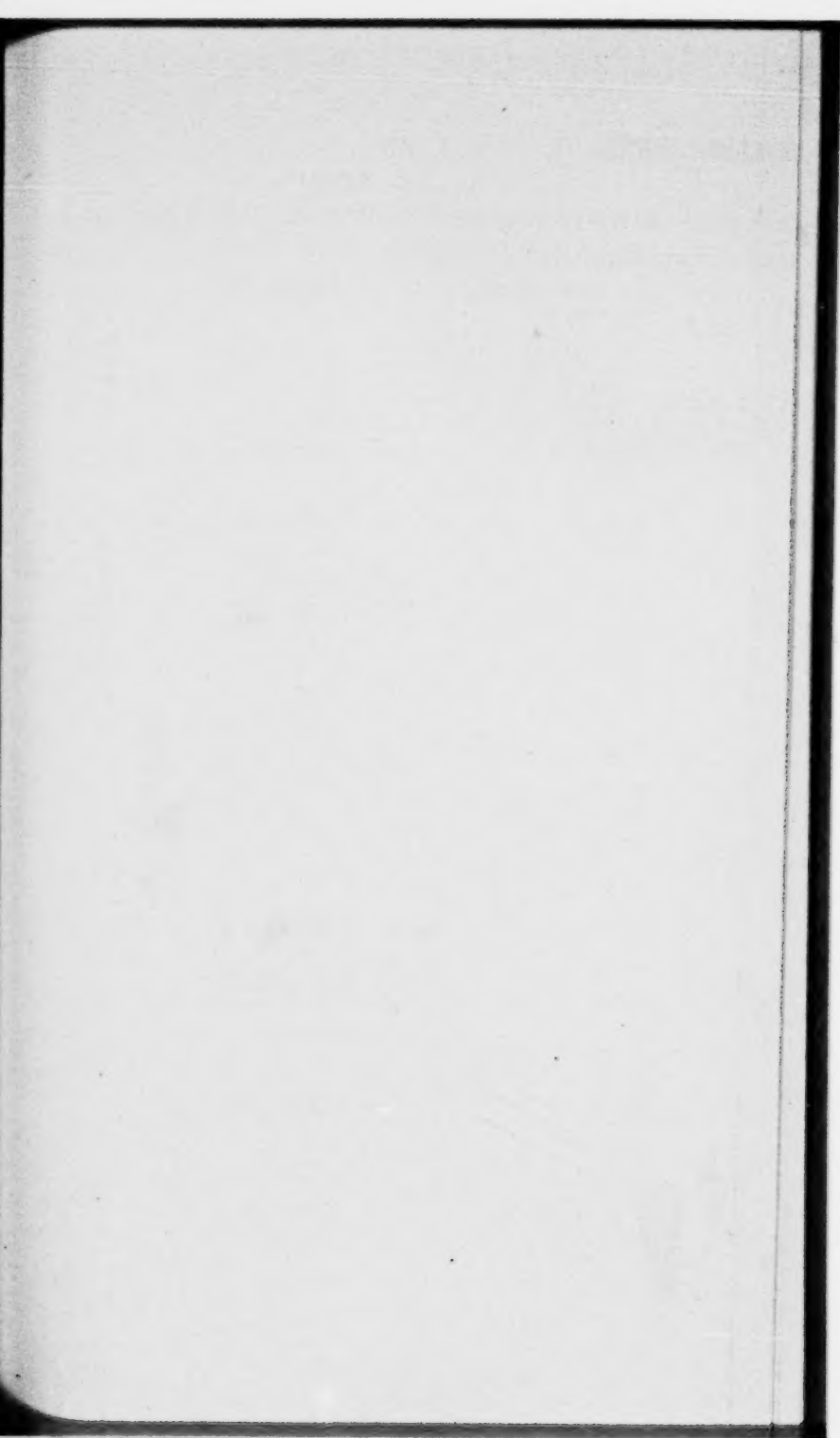
RUSSELL H. PORTER,
Notary Public, New York Co.

List of Shippers, Schooner "Edith Olcott," Sailed for San Juan and Mayaguez, July 30th, 1910.

Lehigh Portland Cement Co.
 Orenstein-Arthur Koppel Co.
 Alpha Portland Cement Co.
 C. D. Jackson.
 U. S. Steel Products Export Co.
 Heywood Bros. & Wakefield Co.
 H. W. St. John & Co.
 Imperial Furniture Co.
 Himebaugh Bros.
 Lawrence Oettinger.
 George P. Anderton.
 Markt & Schaefer Co.
 Solomon Maduro.
 North American Trad. Co.
 Fiske Bros. Refining Co.
 McMurtrie-Guiler Co.
 Dennison's Mfg. Co.
 Lawrence Cement Co.
 Gregg Co., Ltd.
 F. & J. Meyer.
 Sucs. de M. Lomba & Co.
 Columbia Wagon Co.
 B. Souta & Co.
 Franklin Baker Co.

Report and manifest of Cargo laden at the port of New York,
 on board the Schooner "Edith Olcott" whereof — — — is Master
 (or Conductor), bound for San Juan and Mayaguez, P. R.
 — Tonnage. — Crew.
 New York, July, 1910.

(Here follows Exhibit B, marked pages 39, 40 41 and 42.)



OUTWARD FOREIGN MANIFEST.

REPORT AND MANIFEST of Cargo laden at the port of *New York* on board the Schr. "Edith Olcott,"
 whereof..... is Master (or Conductor), bound for San Juan and Mayaguez, P. R. 1066
 Tonnage Crew. New York, July , 1910.

Answer to Interrogatories.

Marks	Numbers	Packages and Contents with Arti- cles Fully Described	Quantities Lbs. Gallons Etc.	Value of Domestic Merchandise	Value of Foreign Merchandise Free	Value of Foreign Merchandise From Bonded Warehouse	No. 4 Value of Foreign Mer- chandise not from Bonded Warehouse which has paid duties	No. 5 Value of Foreign Mer- chandise on the Passage in Transitu from one For- eign Country to another	To be Landed at
S. J. O. 162	1	Safe	4,960	250.00					
656	240	bdls. Galv. Cars Iron...	37,422	1,085.24					San Juan, P. R
68	515	reels Bart. Wire	36,050	886.83					
M. A. D. 66	250	bdls. Galv. Iron	35,150	1,143.13					
M. A. D. 1	8	pcs. Steel Bars	3,294	50.70					
S. D. A. 1	20	bdls. Steel Bars							
272	240	bdls. Galv. Corr. Iron...	37,326	1,082.45					
S. D. A. 1	20	pcs. Steel Channels	2,720	43.52					Mayaguez, "
	16	bdls. Steel Angles	25,386	406.99					San Juan, "
	330	pcs. Steel Angles							
238M. A. D.	110	C/S Wire Nails	8,800	221.52					Mayaguez, "
G. & S. 1	5	Crts. Wagon Parts	3,117	150.00					
	1	box Wagon Parts							
102	1/20	C/S Gunpowder	864	138.00					
	21/40	bdls. Lump Chalk	6,345	41.00					
	41/50	" Span White	2,181						San Juan, "
	51/60	" Plaster	2,500	13.50					
	140	bdls. Holloware							
	545	" Bowls	31,795	885.00					Mayaguez, "
	250	" Fire carriers							
P. L. & C. 1	1239	bdls. Dressed White Pine							
L. 1	392	" " " " " " " "	23,248	683.00					San Juan, "
	532	" White Pine Rough							
	100	" " " " " " " "	18,908	399.00					
	100	bags Oats, 468 bus.	15,100	225.00					
	20	half bbl. Cube Sugar	2,600	145.00					
	3	coils Manila Rope	1,166	91.00					
	13	C/S Candles	1,326	70.00					
	500	bxs. Soda Crackers	8,500	261.00					
140	5000	Fire Bricks	31,250	82.00					
1/10	10	C/S Tin Plate	913	38.00					
10/29	20	bales Oakum	1,000	36.00					San Juan, "
30	1	bdl. Galv. Pipe	141	6.00					
31/66	26	C/S Lanterns	1,164	55.00					
67	1	bdl. Wood Shovels	50	8.00					
68	1	C/S Lantern Globes	94	3.00					
93/96	24	bdl. Galv. Pails	1,158	20.00					
97	1	C/S Wire Goods	54	4.00					
98/99	2	C/S Pumps	319	21.00					
101/124	24	Ice Cream Freezers	264	24.00					
125/128	4	pkgs. -16c/s Coffee Mills	452	12.00					

Exhibit "B."

OUTWARD FOREIGN MANIFEST.

REPORT AND MANIFEST of Cargo laden at the port of *New York* on board the Schr. "Edith Olcott,"

..... Agents.

whereof.....is Master (or Conductor), bound for San Juan and Mayaguez, P. R. 1066

..... Tonnage Crew. New York, July , 1910.

Marks	Numbers	Packages and Contents with Arti- cles Fully Described	Quantities Lbs. Gallons Etc.	Value of Domestic Merchandise	Value of Foreign Merchandise Free	Value of Foreign Merchandise From Bonded Warehouse	Value of Foreign Mer- chandise not from Bonded Warehouse which has paid duties	Value of Foreign Mer- chandise on the Passage in Transitu from one For- eign Country to another	To be Landed at
142	1	bbl. Iron Castings.....	348	22.00	San Juan, P. R
71	1	C/S Lantern.....	94	39.00	.....	.....	.....	.....
FO&C 1/24	24	C/S Enamel & Tinware			" "
25/30	6	crts.]	2,012	150.00	.....	.....	.....	.....
F. B. W. 1/4	75	bbls. Earthenware.....	15,000	750.00	" "
P 43 73	1	C/S Chairs.....	267	45.25	.....	.....	.....	.....
Y	362	bbls. White Pine Lumber 1x12x12/16' Dressed 2 sides & T. & G. said to contain 31,209 L. ft.....	28,000	465.00	" "
A	621	pcs. White Pine Lumber 1x12x12/16' Dressed 2 Sides & T. & G. said to contain 9013 ft.....	15,600	350.00	.....	.....	.....	.....
B	616	pcs. White Pine Lumber 1x12x12/16' Dressed 2 Sides & T. & G. said to contain 8,959 feet.....	15,000	275.00	Mayaguez"
M 524 333					.....	.....	.....	.....
SAB CDEF	6	C/S Enamelware.....	1,390	125.00	" "
M 530 S 1/2	3	crts. Wood Tables.....	1,100	65.00	.....	.....	.....	.....
MCS 1/11	11	crts. Earthenware.....	550	30.00	San Juan, "
M 538 S 150	50	bbls. Wood Wheel Rims.	2,400	65.00	.....	.....	.....	.....
M 522 S	37	bbls.	1,224	60.00	Mayaguez
3/25	25	C/S Wood Chairs.....		145.00	.....	.....	.....	.....
26/35	70	C/S Wood Rockers.....	5,290	95.00	.....	.....	.....	.....
34	1	C/S Carriage House.....	60	5.00	.....	.....	.....	.....

Answer to Interrogatories.

Answer to Interrogatories.

MASTER'S OR CONDUCTOR'S OATH ON CLEARING OUTWARD

District and Port of New York

.....Master of the
.....bound from the Port of New York to
.....do solemnly, sincerely and truly swear
that the Manifest of the cargo on board the said vessel, now delivered by me to the Collector of this District, and subscribed with my name, contains according to the best of my knowledge and belief, a full, just and true account of all the Goods, Wares and Merchandise now actually laden on board the said vessel, and of the value thereof, and if any other Goods, Wares and Merchandise shall be laden or put on board the said vessel previous to her sailing from this Port, I will immediately report the same to the said Collector. I do also swear that, I verily believe the duties on all the Foreign Merchandise therein specified, have been paid or secured according to law, and that no part thereof is intended to be reloaded within the United States; and that if by distress, or other unavoidable accident, it shall become necessary to reload the same, I will forthwith make a just and true report thereof to the Collector of the Customs of the District wherein such distress or accident may happen. I do furthermore swear that I have not received on board such vessel, and have not under my care or within my control and that I will not receive and convey any letter or letter packets, addressed to any foreign country, which have not been delivered to me from the Post Office; except such as relate to the cargo, and are addressed to the owner or consignee of said vessel, or such as are enclosed in a United States stamped envelope of a denomination sufficient in amount to cover the United States postage legally chargeable thereon, if the same had been posted and transmitted by the regular mail. I further swear that no live cattle, sheep, goats, or swine are or will be taken on board for export other than those for which certificates have been issued as required by the Act of June 30, 1906, and that there is not, and will not be taken on board for export, any meat or meat food products which have not been legally inspected and passed in accordance with the aforesaid act.

And said cargo is truly intended to be landed in the Port of.....
So Help me God.

Sworn to before me this
day of

191 }

Deputy Collector.

.....Master.

Clearance Fee.....
Bill of Health.....
Total



43

EXHIBIT C.

1910.

- July 13. In port Schr. Edith Olcott, New York San Juan General cargo under deck (8-9-10 J. H. G.) \$195, 2%.
- July 13. In port Schr. Edith Olcott, New York, San Juan General cargo under deck, \$195, 2%.
- July 13. In port Schr. Edith Olcott, New York, San Juan, cargo on deck 9%.
- July 13. In port Schr. Edith Olcott, New York, San Juan. Profits on Charter, \$1755, 2½%.
- July 13. In port Schr. Edith Olcott, New York, San Juan. Advance Charges, 2%.
- July 13. In port Schr. Edith Olcott, New York, San Juan. Bbls. Port. Cement, 10% P. A. 3%.
- July 13. In port Schr. Edith Olcott, New York, Mayaguez via San Juan, P. R. General cargo under deck, 2¼%.
- July 12. In port Schr. Edith Olcott, New York, San Juan. Cargo on deck, 9%.
- July 13. In port Schr. Edith Olcott, New York, San Juan. Profits on Charter, \$1098.00 2¾%.
- July 13. In port Schr. Edith Olcott, New York, San Juan, Advance Charges 2¼%.
- July 13. In port Schr. Edith Olcott, New York, San Juan. Bbls. Port. Cement, 10% P. A. 3¼%.

44

Exceptions to the Answer- to the Interrogatories.

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and Another, Respondents.

Exceptions to the Answers by Libellant to the Interrogatories of
Fields S. Pendleton, Respondent.

The Respondent Fields S. Pendleton hereby excepts to the Libellant's answers to the interrogatories attached to his answer, as follows:

First. To the answer to the Seventh Interrogatory, on the ground that the character of the interest of the libellant in the shipment set out in the answer is not stated.

Second. To the answer to the Ninth Interrogatory, inasmuch as

(a) Libellant has not answered whether or not the authorization was in writing; (b) nor whether, if oral, when, where and by whom the authorization was made; (c) nor what were the terms of the authorization; (d) nor who are the underwriters requesting the institution of the suit; (e) nor what was the shipment upon which the insurance was made, with full details thereof.

Third. To the answer to the Twelfth Interrogatory, that the

answer is incomplete in that it does not give the comparison of rates asked for in the last part of the interrogatory.

45 Dated, New York, February 19th, 1912.

HENRY W. GOODRICH,
Proctor for Respondents.

49 Wall Street, New York City.

Order Overruling Exception to Answer to the Interrogatories.

At a Stated Term of the United States District Court, Held in and for the Southern District of New York, at the Court-room thereof, in the United States Court and Post Office Building, in the Borough of Manhattan, New York City, on the 20th Day of April, 1912.

Present: Hon. Charles M. Hough, District Judge.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually, Respondents.

The respondents herein having heretofore and on or about the 19th day of February, 1912, filed exceptions to the answers
46 by libellant to the interrogatories filed on behalf of the respondent Fields S. Pendleton, and the said exceptions having been regularly brought on for a hearing before this court on the — day of March, 1912, and the court having filed an opinion herein on the — day of March, 1912, overruling the said exceptions, it is, on motion of Harrington, Bigham & Englar, proctors for the libellant.

Ordered, that the exceptions filed by the respondent Fields S. Pendleton, to the libellant's answers to the interrogatories attached to respondent's answer be and the same are hereby in all respects overruled.

Enter.

C. M. HOUGH, *U. S. D. J.*

47

Testimony.

United States District Court, Southern District of N. Y.

BENNER LINE, Libellant,
against.

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Respondents.

Before Hon. Geo. C. Holt, District Judge.

NEW YORK, October 9, 1913.

Appearances:

Messrs. Harrington, Bigham & Englar (Mr. Englar), for Libellant;

Henry W. Goodrich, Esq., for Respondents.

The claims of the libel and answer are stated.

Mr. Goodrich asks to have his associate, William H. Gulliver, Esq., of the District of Maine, conduct the case.

The Court says Mr. Gulliver cannot be admitted to conduct the case, but that if he wishes to take part in the trial he may do so.

Mr. Goodrich moves to dismiss the case on the pleadings and the answers to the interrogatories, upon the ground that the libellant has no capacity to sue.

The Court denies the motion without passing on the merits.

48 HARRY DEMOCH, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Englar:

Q. What is your business?

A. Seaman.

Q. How long have you been going to sea?

A. Going on eleven years, sir.

Q. What nationality are you?

A. I am a German.

Q. Tell us in a general way what class of ships you have been on and what waters?

A. I have been in square-rigged sailing ships, and then in two steamboats, and then I sailed for five years on the Atlantic Coast, in the United States, in schooners.

Q. And on what vessel are you employed now?

A. I am now in steam vessels.

Q. And what particular vessel?

A. I am now in the lighthouse tender.

Q. Is that out in the Lakes?

A. Out in the Lakes, yes sir.

Q. A United States vessel employed as a tender to the lighthouse?

A. Yes, sir, she is a Government vessel.

Q. You were brought here from that vessel to testify?

A. Yes, sir.

Q. Did you on July 30, 1910, sail before the mast on the schooner Edith Olcott?

A. Yes, sir, I did.

Q. Where was she lying at that time?

A. She laid on—

Q. I don't care about the number of the pier.

A. I don't know the number of the pier; I know it was abreast of the Seamen's Union Hall.

49 Q. On South Street?

A. On South Street, yes, sir.

Q. About what time of day did you go aboard?

A. I went on board just after noon, about one o'clock I think it was.

Q. How long after that did the vessel sail?

A. Why I don't know what you mean.

Q. How long after you went aboard was it before the vessel sailed?

A. Well, we go aboard with the towboat, and——

The Court: How soon did you sail after you went on board?

The Witness: We didn't have no time to—we just let go of the lines and the towboat took her off.

The Court: You sailed immediately?

The Witness: Yes, sir.

Q. Just answer my questions as well as you can. She sailed almost immediately after you went aboard?

A. Yes, sir.

Q. Who was on board of her at the time you got there, if you know?

A. The captain was on board, the mate was on board, the engineer and cook, and a young Porto Rican fellow; that is all I know.

Q. The rest of the crew came on board at the time that you did?

A. Yes, sir.

Q. Now had you ever sailed on this vessel before?

A. No, sir.

Q. Were you towed down the harbor?

A. I did not; I have been towing through the harbor on schooners.

Q. I say was this vessel towed down the harbor?

A. Yes, sir, she was.

Q. Did she go right out to sea that night?

50 A. No, sir, I think—I don't recollect; I think the next morning.

Q. Did she anchor that night?

A. Yes, she anchored somewhere around Sandy Hook I think it was.

Q. You sailed on Saturday, didn't you?

A. Yes, sir.

Q. That was Saturday, July 30th?

A. Yes, sir.

Q. And Sunday was the 31st, and the first of August was on Monday?

A. Yes, sir.

Q. Now it was on the 31st of July, Sunday morning, that you actually put out to sea?

A. Yes, sir.

Q. Now when was the first that you had any knowledge or heard anything about there being any trouble with the vessel; what day of the week was it?

A. It was Tuesday night; I was at the time at the wheel, from 8 to 12; it looks kind of black, and the captain came on deck and took the wheel, and told me to go forward and clew up the topsails; and we did; and as soon as we did that it started raining and it commenced to breeze; it was fair; we didn't need to lift the lower sails, they were just the same; it wasn't that strong.

Q. You left the lower sails set, but you clewed up the topsails?

A. Yes, sir.

Q. Up to that time you had good weather?

A. Yes, sir.

Q. You were on watch you say?

A. From 8 to 12.

Q. On Tuesday night?

A. Yes, sir.

Q. Did anything else happen that night, anything go wrong or anything said about leaking that night?

A. No, no, not that I heard of.

Q. When did you first hear anything said about the vessel leaking?

A. This was the day after.

51 Q. It was Wednesday?

A. Wednesday at noon.

Q. Before or after you had your dinner?

A. After I had my dinner, sir; the engineer came from aft and told me she was leaking.

Q. Had you been on watch during the morning of Wednesday?

A. Yes, sir, I had.

Q. What hours?

A. I was on watch from 4 to 8, sir.

Q. Were you below from 8 to 12?

A. Yes, sir.

Q. And it was after you had your dinner that you heard the vessel was leaking?

A. Yes, sir.

Q. Now when you went to have your dinner did you go from the fore-castle to the galley?

A. No, sir; I went with the engineer to the engine room.

Q. To the engine room?

A. Yes, sir.

Q. But I mean where did you eat your dinner?

A. Right in our fore-castle.

Q. Now when you came out on deck after you had had your dinner were any pumps working at that time?

A. No, sir.

Q. No pumps of any kind?

A. No pumps of any kind, no sir, we didn't know it before, it was leaking.

Q. You first heard at that time that the vessel was leaking?

A. Yes, sir.

Q. Now what was done in the way of starting pumps, or any other measures, to get the water out of the vessel?

A. Well, I went to the engineer, and the engineer made up steam and started them two Messenger pumps.

Q. Now the Messenger pumps—there was a pump outside of the engine room, aft of the engine room?

A. Yes, sir.

Q. With a chain that ran outside of the engine room and went over the wheel of the Messenger pump and over the shaft of the winch; that is what you refer to as the Messenger pump?

52

A. Yes, sir.

Q. That Messenger pump was a double pump, wasn't it?

A. Yes, sir.

Q. And that is the pump you say the engineer started at that time?

A. That was the pump.

Q. What other pump or pumps did the vessel have?

A. She had a wrecking pump.

Q. How did that work?

A. She works well; she works by steam.

Q. Well I mean——

A. She doesn't work——

Q. How does the power get to the pump?

A. The steam comes from the boiler into the steam chest of the pump, see?

Q. Was the wrecking pump of the Olcott of that type; did you turn the steam into the pump, or run it with the winch?

A. Run the steam into the pump.

Q. In this wrecking pump?

A. Yes, sir.

Q. Did you ever see it run?

A. No, sir, I did not.

Q. You never saw it running?

A. No sir, I did not.

Q. At the time you went in the engine room after dinner, or went to the engine room——

A. I stayed outside of the engine room.

Q. Was the wrecking pump running as a matter of fact?

A. No, sir.

Q. Was the Messenger pump running?

A. The engineer started the Messenger pump.

Q. Now after seeing that done, what if anything were you called upon to do?

A. I asked the engineer if he didn't want to start the wrecking pump, and he told me that he was—he told me she was on the bum, that is what he told me.

Q. Did he in fact start that at any time?

53 A. No, sir, he didn't start it at all; he couldn't start it.

Q. Now after you left the engine room where did you go?

A. Then the mate took us aft to try them two hand-pumps.

Q. She had two hand-pumps aft, did she?

A. Yes, sir.

Q. About where were they situated?

A. About in front of the cabin, one I think on each side of the spanker mast.

Q. Tell us just what you did, as nearly as you can remember.

A. Well, the mate took us all aft and we threw water into her; the mate called all hands aft, all the boys aft.

By the Court:

Q. When was this?

A. Wednesday afternoon just after dinner; about half-past one; and we tried them two pumps, and we couldn't get them started; and the starboard pump we couldn't move the handle at all. So the cap-

tain told the mate, you better pull the whole pump out on deck and see what is the trouble with it.

Q. That is a different pump from the Messenger pumps?

A. About the same, only they are worked by hand, and the Messenger pump is just run by steam. So we pulled this starboard pump out on deck and it took us pretty near all the afternoon; and this pipe, about 20 feet long, she was all rusted through, and full of small holes; so the mate told us it was no use to put it back again, and we couldn't make it anyway, we couldn't make the pump work with those holes, she would never catch water that way.

By Mr. Englar:

Q. What did you do with the pump then?

54 A. The mate told us to lash it down on deck; we lashed it down.

Q. Now from that time on——

By the Court:

Q. You mean by the pump, the pipe going down?

A. Yes, sir.

Q. You say it took you all afternoon to get it up?

A. From half-past two till five o'clock.

Q. What was the difficulty? Nothing but a pump and the pipe down in the hold?

A. Yes, that is all; there is a hole in the deck and the pipe is a tight fit, and it was rusted, and we had a hard time to pull it out. We used a spanker tackle and all hands pulled it out.

By Mr. Englar:

Q. While you were pulling it out did you bend the pipe at any time?

A. No, there was no sea at all that time; it was a little swell.

Q. Now when you got that out you lashed it on deck?

A. Yes, sir.

Q. While you were on the vessel did you at any time use either of the hand-pumps?

A. No, we just tried them, and we didn't get any water out of them.

Q. When do you mean you tried them, on this occasion that you have told about?

A. Yes; and after that we never tried them again.

Q. Never tried them again?

A. No, sir.

Q. I understand you to testify that you weren't able to get up any water with either one of them?

A. No, sir, we could not.

The Court: Did you pull them both out?

The Witness: No, sir, just one, the starboard side.

55 Q. You had previously tried the port pump?

A. Yes, sir, we tried the port pump too; one of the sailors named Reichert, he was looking for packing, and the engineer didn't

have no packing; so he pulled an old shoe to pieces and put packing in of it.

Q. For which pump?

A. The port hand-pump; it didn't help any; we didn't get no water out of it; so we thought the pipe must be rusted through, like that on the other side.

Q. Now after Wednesday did you have any pump running except this Messenger pump which you have told us about?

A. No, sir.

Q. That Messenger pump was the only pump you had running after Wednesday?

A. Yes, sir.

Q. Now about how was that running; was it running at full force?

A. No, sir.

Q. How would you say that pump compared as to the amount of water which it was throwing, with an ordinary hand-pump being worked by two men?

A. Why both of them pumps, they wouldn't throw as much as a good ordinary hand-pump.

Q. Now this was a sort of double hand-pump run by steam?

A. Yes, sir.

Q. That is, it was of the same type as a hand-pump, but run by steam?

A. Yes, sir.

Q. And it had two plungers?

A. Yes, sir.

Q. And you say that the two of them together didn't throw as much as an ordinary hand-pump?

A. No, sir, they did not.

Q. Now what sort of weather did you have, generally speaking, from Wednesday until Saturday of that week?

A. Why Wednesday morning we had a pretty strong breeze, not extra strong, breeze; we lifted the spankers, and we shook the spankers out on the same day.

56 Q. What morning was this?

A. This was Wednesday morning. Saturday night we clewed the topsails up, and Wednesday morning we lift the spankers.

Q. Now let us take it day by day: On Wednesday you have already described the weather?

A. Yes, sir.

Q. And how did the weather on Thursday compare with Wednesday?

A. Thursday there was hardly any wind at all; there was just an easy swell, that is all; I think it was raining once in a while; there was no wind.

Q. And on Friday?

A. The same; about the same weather.

Q. Did you have any weather that you considered at all rough after Wednesday?

A. No, sir.

Q. Was there any sea at any time which would have prevented the men from standing at the hand-pumps?

A. No, sir.

Q. Assuming that the hand-pumps had been in good condition could you have stood and worked them at all times?

A. Yes, sir, we could have worked them all the time.

Q. About how long can two men work at hand-pumps without relief?

A. I have been working at hand-pumps an hour at one stretch.

Q. You can work an hour, can you?

A. Yes, sir.

Q. On Saturday did you sight a vessel? You sighted a steamer, the King Edgar?

A. Yes, sir.

Q. And did she come up to you?

A. Yes, sir.

Q. When did you leave the schooner?

A. I left the schooner as soon as she came alongside of us; I left it with the mate, a sailor by the name of Reichert, one Porto Rican fellow; and I left one stowaway.

57 Q. That was on what day?

A. That was on Saturday, I think it was, just before noon time.

Q. Saturday morning?

A. Yes, sir.

Q. What did you leave in?

A. We left in our gasolene boat; that was the only boat we had on board.

Q. A power boat?

A. Yes, sir.

Q. Was the power working at that time?

A. A. No, sir.

Q. How did you do—row her?

A. Rowed her, yes, sir.

Q. You didn't go back on board of her again?

A. No, sir.

Q. Did you witness, or overhear, any of the conversation with respect to salvage services between the captains of the two vessels?

A. Sir?

Q. Did you hear any conversations or negotiations between your captain and the captain of the steamer about towing the boat?

A. Yes, sir, I did.

Q. You were taken in tow, were you, by the steamer?

A. Yes, sir.

Q. On what day?

A. Saturday. They passed a tow line over to the schooner about 6 o'clock, and towed her till next morning at 6 o'clock.

Q. Then what happened?

A. Then the tow line parted.

Q. Then what happened?

A. The steamboat stopped and waited till the fellows from the schooner pulled over with the boat.

Q. In other words everybody left the schooner and came on board the steamer?

A. Yes, sir.

Q. And came back to New York?

A. Yes, sir.

Q. Now had any members of the steamer's crew been on the schooner?

A. Yes, sir.

Q. About how many men?

A. I think it was—I ain't sure—five or six men.

58 Q. Those men came from the steamer and on the schooner?

A. Yes, sir.

Q. While the towing was being done?

A. Yes, sir.

Q. Did you personally have any opportunity to observe how fast the schooner was leaking?

A. Yes, sir, I had.

Q. Just tell us what your observations show?

A. I went down in the forward hold Wednesday night about five o'clock; I sounded her water down there; I took a stick and sounded the water, and it came up and it was 4 feet; and I told the boy it was only 4 feet.

Q. Was that the day the leak was discovered or the day after, that you did that?

A. It was about six hours after, sir.

Q. Six hours after what?

A. After we discovered the leak; and I went down next morning again and there was 5 feet in her; it was 5 feet of water in her.

Q. She had 4 one evening and 5 the next morning?

A. Yes, sir.

Q. So she gained a foot over night?

A. Yes, sir, she gained a foot over night.

Q. You have had experience with hand-pumps, have you, such as were on this vessel?

A. Yes, sir, I have.

Q. Can you state whether two hand-pumps such as you had on this schooner would have taken an inch of water an hour out of that vessel?

A. Yes, sir.

Mr. Goodrich: I object unless the witness is qualified; that is one of the most difficult calculating matters that one can compute.

Objection overruled.

59 Q. Are you able to tell the amount at this date, how many were in the crew of this schooner?

A. Yes, sir.

Q. How many were there?

A. I will count them up: There was the captain, the mate, engineer, cook and five men before the mast; nine men altogether.

Q. Then was there anybody else on board?

A. There was two stowaways.

Q. Were they both stowaways?

A. Yes, sir, they didn't belong to the crew though.

Q. What nationality were they?

A. I think they were Porto Ricans.

Q. Did you at any time on Tuesday night or at any other time while you were on the schooner feel any shock as though the schooner had struck anything?

A. No, sir.

Q. Did you hear anything said on the schooner about having struck anything?

A. No, I did not.

Q. Not at any time while you were on the schooner?

A. No, sir.

Q. Did you ever hear anything said, or did you ever say anything of the wrecking pump having stripped some cogs?

A. No, sir.

Q. You never heard anything of that sort?

A. No, sir.

Cross-examined by Mr. Goodrich:

Q. How many pumps did this vessel have?

A. Sir?

Q. How many pumps did this vessel have?

A. Well, I think she had about five pumps.

Q. Name them.

A. Five of them.

Q. What were they?

A. There was two Messenger pumps, two hand-pumps and one wrecking pump.

60 Q. That is all, is it?

A. Yes, sir.

Q. There was no circulating pump?

A. There was a small feeding pump I think.

Q. A circulating pump also?

A. Yes, sir.

Q. That is one more than you have said?

A. Yes, sir.

Q. You didn't testify anything about the circulating pump; was that going?

A. No, not that I know of.

Q. You don't know about it?

A. I didn't see it going.

Q. You are not prepared to swear that she wasn't going?

A. She wasn't going, no sir.

Q. You swear that the circulating pump was not going?

A. She was going for feeding the boiler.

Q. Do you swear she was not going for pumping out the ship?

A. I don't know.

Q. You were below, weren't you, on Wednesday morning from 8 to 12?

A. Yes, sir.

Q. Your watch over?

A. Yes, sir.

Q. And you were asleep all that time?

A. No, sir.

Q. And you don't know what took place on deck?

A. I didn't sleep that day.

Q. You didn't come out until 12 o'clock?

A. No, I couldn't sleep they were making so much noise you couldn't sleep.

Q. They were pumping Wednesday morning?

A. No, this was Thursday morning.

Q. You said you were off watch from 8 to 12 noon on Wednesday morning; were you asleep downstairs?

A. Yes, sir, that day I slept.

Q. You slept all that time?

A. Yes, sir.

Q. And you don't know what was going on on deck, do you?

A. No, sir.

61 Q. You don't know anything about starting the wrecking pump, do you?

A. No, sir.

Q. You couldn't say when the wrecking pump commenced going?

A. No.

Q. All you know was when you came out on deck at 12 o'clock, or after dinner—

A. Yes, sir.

Q. You had dinner as soon as you came out on deck?

A. Yes, sir.

Q. And then you found the pumping going on?

A. No, the engineer told me that she was leaking.

Q. You swear there was no pumping going on when you came out on deck at 12 o'clock?

A. Yes, sir.

Q. Did you ever see me before?

A. I don't know; I can't recollect.

Q. My name is Goodrich.

A. I don't think I have seen you.

Q. And my client's name is Pendleton; there are two of them; one of them is Edwin S. Pendleton. Do you remember coming to my office on the 31st day of October, 1910?

A. No, I don't remember.

Q. Do you deny that you were there?

A. Mr. Pendleton took me up to an office one day, I don't know what office it was, I don't recollect.

Q. Wasn't it to my office?

A. I don't remember you, sir.

Q. Didn't I ask you some questions about yourself?

A. Somebody—a fellow in the office asked of me, yes, sir.

Q. Well, take it for granted that I am the fellow in the office that asked questions.

A. I will take it for granted; I am going to tell you the way it was.

62 Q. Wait and answer my question.

A. Yes, sir.

Q. Did I ask you some questions?

A. I don't recollect it, sir.

Q. You don't recollect?

A. No, sir.

Q. Didn't I ask you what your name was and what your address was?

A. I guess you did, but I don't recollect.

Q. Did you give me your address?

A. I don't know, sir.

Q. Did I ask you how you came to go to Mr. Pendleton's office?

A. I guess you did, yes, sir.

Q. And did you tell me how you went there?

A. I don't know if I did, sir.

Q. Didn't you say that the delegate took you there?

A. I don't think so, sir.

Q. Do you deny that you said that?

A. I won't deny it.

Q. And did you say that you had been to the Insurance Company's office?

A. I don't know, sir.

Q. Do you deny saying it?

A. I wouldn't deny it.

Q. Did you say that you had an engagement to go to the Insurance Company's office that afternoon?

A. No, I didn't say that.

Q. Do you deny saying that?

A. Yes, sir.

Q. And didn't you say that you were going with a delegate of the Atlantic Seamen's Union?

A. I guess I say that.

Q. And did you say that you were to get \$50 for making an affidavit for the Insurance Company?

A. No, sir.

Q. You deny that, do you?

A. Yes, sir.

Q. Who was with you at the time?

A. Mr. Harry Reichert.

63 Q. Mr. Reichert who is here?

A. No, sir.

Q. That is not the man (indicating)?

A. No, sir.

Q. Where is Reichert?

A. I don't know, sir.

Q. Never have seen him since?

A. No, sir.

Q. Didn't I order you out of my office?

A. Yes, sir.

Q. And tell you if you went to the Insurance Company and offered to sign a protest and told lies about it I would have you juggled?

A. Yes, sir.

Q. Well did you go to the Insurance Company that afternoon?

A. No, sir.

Q. Did you go to Mr. Englar's office that afternoon or at any other time?

A. I suppose some other time.

Q. And you made a statement, did you?

A. Yes, sir.

Q. And were you paid \$50 for it?

A. No, sir; I didn't say so either; I never knowed anything about it, \$50; it is the first time I ever heard it.

Q. Now then why did it take so long on Wednesday to get the starboard pump up from the bottom of the vessel; the starboard hand pump?

A. Well, we couldn't get it out any quicker.

Q. Why?

A. It was hard pulling for us to get it out.

Q. Didn't you have to work it backward and forward?

A. Yes, sir, we used everything.

Q. You used the spanker halyards and they were not right over the pump; and you worked it backward and forward?

A. Yes, sir.

Q. And did you try to get the pump pipe back after you had gotten it out and found it wouldn't go back?

A. No, sir.

64 Q. You swear you didn't try to put it back?

A. Yes, sir.

Q. You don't think you had anything bad in the way of weather except Wednesday morning?

A. Yes, sir.

Q. And Wednesday was pretty bad?

A. Not so bad; a stiff breeze.

Q. Did you have anything to do with sounding the pumps on Saturday?

A. No, sir.

Q. Sunday, Monday or Tuesday?

A. No, sir.

Q. Was there any water in the vessel so far as you know until Wednesday?

A. I sounded her Wednesday morning on my own account.

Q. No—answer my question. (Repeated.) Was there any water in the vessel so far as you know until Wednesday? Everything was all right until Wednesday so far as you knew?

A. Yes, sir.

Q. And when you sounded on Wednesday there were 4 feet of water in her?

A. Yes, sir.

Q. Well, how could that have happened?

A. I don't know.

Q. She looked all right, didn't she?

A. She looked all right, yes sir.

Q. You couldn't see any place where any water was coming in?

A. No, I could not.

Q. So far as you know there were no leaks in her?

A. I couldn't see no leaks, no, sir.

Q. You haven't any idea what made her leak?

A. No, sir. I got an idea, yes, sir; I got a little idea; I think the seams had opened up.

Q. Oh, you think the seams had opened up, oh?

A. Yes, sir.

Q. Where had the seams opened up?

A. All over the bottom I think.

65 Q. You think the seams had opened up all over the bottom?

A. Yes, sir.

Q. In what period? How long had it taken?

A. Well, that doesn't take long; she had a very heavy cargo on, sir.

Q. And everything was all right at 12 o'clock on Tuesday night when you went to bed, when you turned in?

A. Yes, sir.

Q. And between that and noon the next day the seams of the vessel had opened up and the vessel had taken in 4 ft. of water; that is what made her leak?

A. No, I think so; that is what I am thinking; I didn't see her; I couldn't see her.

Q. Didn't you ask Mr. Fields Pendleton, or his brother, Mr. Edwin S. Pendleton, to give you \$50 for testifying?

A. No, sir.

Q. Never did?

A. No, sir.

Q. Or any other sum?

A. No, sir, I didn't.

Q. Are you a member of the Atlantic Seamen's Union?

A. Yes, sir.

Q. You were at that time?

A. Yes, sir.

Q. Do you know how much water there was in the Edith Olcott when you left her?

A. No, sir.

Q. You didn't sound?

A. No, sir.

Redirect examination by Mr. Englar:

Q. How was this vessel trimmed when she left port; was she down by the stern somewhat?

Mr. Goodrich: I object to his leading the witness; if he wants to ask him how she was trimmed all right; don't suggest the answer.

Q. State how much she was trimmed; was she down by the head or at the stern, or was she level?

66 Mr. Goodrich: I object on the ground that it is immaterial; there is no claim of bad stowage here.

The Court: I will take it; answer the question.

A. She was down a little by the stern, sir, a trifle.

FRANK ALLMOND, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Englar:

Q. Frank, are you a seaman?

A. Yes, sir.

Q. How long have you been going to sea?

A. Close on seven years now, sir.

Q. What class of vessels?

A. Both steam and sail.

The Court: Come right down to the ship.

Q. Did you sail on the Edith Olcott, on July 30, 1910?

A. Yes, sir.

Q. In what capacity?

A. Seaman.

Q. When did you go aboard?

A. On the afternoon of Saturday.

Q. Did you go aboard at the same time that Democh did?

A. Yes, sir.

Q. And did you sail right afterward?

A. Yes, sir.

Q. And you anchored that night down by Sandy Hook?

A. Yes, sir.

Q. And the next day you got up sail and went to sea?

A. Yes, sir.

Q. Now the next day was Sunday, July 31, 1910?

A. Yes, sir.

67 Q. Now, all went well did it, Monday and Tuesday?

A. Yes, sir.

Q. And what kind of weather did you have Tuesday night?

A. Well, to my knowledge, sir, it was just the same as she got on the Sunday and Monday.

Q. What time Tuesday night were you on watch?

A. I was on watch from 8 to 12 on Tuesday night.

Q. From 8 to 12. And when you turned in do you remember whether there was any unusual weather?

A. No, sir, nothing unusual.

Q. Well, was it smooth, or was there any wind?

A. Well, there was what you might call a breeze, a stiff breeze; but that was all.

Q. On the following morning, Wednesday morning, what time were you on deck, if at all?

A. From four to eight in the morning.

Q. Then you turned in, did you?

A. No, I didn't turn in, not until about 10 o'clock.

Q. About 10 o'clock you turned in?

A. Yes, sir.

Q. Now, up until the time you turned in what sort of weather were you having that morning?

A. Well, good, strong breeze blowing, and a bit of a sea, but not much.

Q. Up to the time you turned in was any pumping done on the schooner?

A. No, sir.

Q. Up to the time that you turned in had you heard anything about the schooner leaking?

A. No, sir.

Q. When did you come out on deck again?

A. I come on deck at midday; I was up at half-past eleven.

Q. You had your dinner at 12, did you?

A. Yes, sir.

68 Q. And then you were up on deck?

A. Yes, sir.

Q. Did you hear anything at that time about a leak in the vessel?

A. Not until I had been on deck about ten minutes.

Q. Then what did you hear, and how did you hear it?

A. Jim came up to me—I was standing at the forecandle, and he told me she was leaking.

Q. Were any pumps started?

A. The pumps were started in the afternoon, sir.

Q. What pump was started, if you know?

A. The Messenger pump.

Q. That is the pump that was outside the house?

A. Yes, sir.

Q. Do you know what other steam pump, if any, was inside the house; what other pumps did the vessel have inside the engine room?

A. She had a wrecking pump.

Q. Do you remember how that worked, how the power was applied to it?

A. I don't know, but I suppose it was from the steam boiler, sir.

Q. Was it being run that afternoon, Wednesday afternoon?

A. No, sir.

Q. You never saw it working at all?

A. No, sir.

Q. Were you at any time called aft to take any part in connection with the hand-pumps?

A. Yes, sir.

Q. Which pump did you try first?

A. The port pump.

Q. Were you able to lift any water with it?

A. No, sir.

Q. Could you move it?

A. You could move the handle, yes, sir; but it was no use.

69 Q. Did you see anyone trying to pack it, or actually packing it?

A. No, sir, I didn't see anyone trying to pack it.

Q. Do you know whether any attempt was made to pack it?

A. I couldn't say, sir.

Q. After trying the port pump, did you try the starboard pump?

A. Yes, sir.

Q. What was the result of that; could you work it at all?

A. No, sir.

Q. You mean you couldn't move the handle?

A. No, sir.

Q. What did you do?

A. Got the tackle and hauled it out on deck.

Q. Did that take long?

A. Yes, all of the afternoon, from half-past two.

Q. After you got it out on deck what did you discover, if anything?

A. Rusted all of it, holes in the pipe and all.

Q. Did you at any time after Wednesday afternoon use either of the hand-pumps for pumping?

A. No, sir.

Q. Was there any reason why you couldn't have pumped if the pumps had been in good condition?

A. No, sir, we could have pumped all right.

Q. Was the sea so heavy that you couldn't have stood at the pumps?

A. No, sir.

Q. Not at any time while you were on board?

A. No, sir.

Q. Did you from time to time see this Messenger pump working, see the water going through?

A. Yes, sir.

Q. Was it working to its full capacity?

A. No, sir.

Q. How did the water which it threw compare with what
70 you could throw with an ordinary hand-pump?

A. A good hand-pump would throw more water than what you could with the Messenger pump.

Q. When did you leave the schooner?

A. On a Sunday morning.

Q. Were you in the last boat to leave?

A. Yes, sir.

Q. And you had been towing her throughout the previous night, that is the steamer, the King Edgar, had been towing her?

A. Yes, sir.

Q. What had happened Sunday morning, had the hawser parted?

A. Yes, sir, the hawser parted about six o'clock on the Sunday morning.

Q. And then you all left the schooner?

A. Yes, sir.

Q. At that time was it noticeable that she had got down in the water, that she was sinking in the water?

A. Yes, sir, she was sinking, but I didn't take much notice myself.

Q. Did you notice whether the seams or butts were opened on her deck?

A. Yes, seams were opened all around the mainmast.

Q. Was she down so low that the water would wash over her decks from time to time?

A. Yes, sir.

Cross-examined by Mr. Goodrich:

Q. What was the weather when you turned in on Tuesday night?

A. There was no weather at all, sir, except a stiff breeze blowing.

Q. No heavy weather?

A. No, sir.

Q. Was there any storm during Tuesday night while you were on deck?

A. No, sir.

Q. Not heavy weather?

A. No, sir.

71 Q. Do you know how much water there was in the vessel Tuesday morning?

A. No, sir, I do not.

Q. Were you told there was 4 ft. in her?

A. No, sir.

Q. How do you account for that water getting in there?

A. How do I account for the water getting in the hold?

Q. Yes.

A. I can't account for it at all; I have no idea.

Q. You have no idea?

A. No, sir; unless there was a butt opened somewhere.

Q. Did you see any signs of a butt opening anywhere?

A. No, sir, I didn't go below decks.

Q. You testified that some seams were opening around the mainmast; when did you see those?

A. That was on deck, I noticed those on Friday night.

Q. Where were you standing, in the well, when you noticed that?

A. In the well deck?

Q. Yes.

A. No, sir, on the poop deck.

Q. And you never noticed them before that?

A. No, sir.

Q. Tell me just exactly what you saw?

A. I just saw the seams opened, the seams running along the deck.

Q. Do you think the water could have gotten down inside?

A. Some water may have got down there.

*Q. Enough to make 4 ft. in her?

A. No.

Q. Not enough to make that?

A. No.

Q. You don't account for the disaster by those seams opening, do you?

A. No, sir.

Q. In other words you don't think the water was washing up from the poop deck and getting down in the hold of the vessel through those seams?

72 A. Well, on the Friday night she was shipping spray and there was water on the deck, and it may have got down there.

Q. There was water in her a few days before that?

A. Yes, but I think that was on account of the ship leaking below the water line.

Q. You think she was leaking below the water line?

A. No, sir.

Q. You only thought so because of the amount of water she was taking in?

A. Yes, sir.

Q. You knew she was all right on Sunday when you went aboard of her?

A. I couldn't say; she looked so.

Q. You didn't know of any trouble, and as far as you could see she seemed to be all right on Saturday, the day you sailed?

A. Yes.

Q. And the same is true of Sunday and Monday and Tuesday?

A. Yes, sir.

Q. And on the Wednesday morning there is suddenly a lot of water in her?

A. Yes, sir.

Q. And you think it came in where?

A. Below the water line.

Q. How could it come in so suddenly; what strain was there on the vessel Tuesday night that caused 4 ft. of water to be in her on Wednesday morning?

A. Mr. Goodrich, that vessel seemed to me all right when I went aboard of her, when I went on her, but I can't see through the water, I can't see whether there were any seams open in her.

Q. But if they were they wouldn't have opened in such a manner that 4 ft. of water would have come into her within 6, 8, 10 hours, would they?

The Court: He says he couldn't see anything.

73 Q. You have no facts on which to base a judgment as to what made that vessel leak, as a matter of fact?

A. That is the only idea I have, that seams opened below the water, or a butt opened.

Q. Opened suddenly?

A. Not suddenly.

Q. But there wasn't any water made in her on Sunday or Monday or Tuesday; you think a seam may have opened suddenly on Tuesday night?

A. No, not suddenly.

Q. There is testimony that she was sounded on Saturday night and Sunday morning, Sunday night, Monday morning, Monday night, Tuesday morning and Tuesday night—sounded all the time, and no water in her; that she was sounded Wednesday morning, or some time during Wednesday, and 4 ft. of water was found in her; now what could account for that?

A. I don't know.

Q. You don't know?

A. No.

Q. Neither do I. Had you been in the engine house at all?

A. Yes, a couple of times.

Q. You say that the Messenger pump was not working to its full capacity; how do you know?

A. By the stream of water she was sending out.

Q. What was the stream of water?

A. Well, the stream of water that she was sending out, a good hand pump would have taken twice as much out.

Q. How much should that Messenger pump normally send out?

A. I couldn't say exactly, sir.

Q. Where was the water from the Messenger pump delivered?

A. On to the well deck forward.

Q. It wasn't delivered over side?

A. No, sir.

74 Q. Are you a member of the Atlantic Seamen's Union?

A. No, not the Atlantic Seamen's Union.

Q. What Union?

A. International Sailors & Firemen's Union.

Q. It that affiliated with the Atlantic?

A. I think so.

Q. You were at this time?

A. At that time I was in the Atlantic Coast Seamen's Union.

Q. Oh, yes, you were at that time?

A. Yes, sir.

Q. Was any attempt to repair the Messenger pump made Wednesday until you left her?

A. I couldn't say, I didn't see any attempt.

Q. You didn't see any, did you?

A. I couldn't see any attempt.

Q. How much water was there in her, do you know, when you left her?

A. To my knowledge there was 13 or 13½ feet of water.

Adjourned until Friday, Oct. 10, 1913, at 10:30 o'clock.

75

NEW YORK, Oct. 10, 1913—10:30 a. m.

Met pursuant to adjournment.

WILLIAM H. BLACK, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Black, what is your business?

A. I am superintendent of the Perth Amboy Drydock Company.

Q. And how long have you been superintendent?

A. Four years.

Q. As such do you have general charge of the yard?

A. I do.

Q. Where is the yard situated?

A. In Perth Amboy at the foot of Broad Street.

Q. Do you remember the schooner Edith Olcott being at your yard?

A. I do.

Q. Was she there in December, 1909, and January, 1910?

A. I think those are the dates.

Q. And was she there again in July, 1910?

A. Yes, she was.

Q. What was done to her, if anything, in December and January?

A. Why I have notes; I will look it over. December——

Q. Yes.

A. December 21 to January 7, 1910, why we made a new rudder stock, spliced her mizzen mast, hauled on the dock, renewed a part of her rigging, renewed where necessary; searched — caulked on deck and top sides, repaired and reinforced one beam; examined and repaired engine and pump; general minor repairs, sir.

76 Q. Not a general overhauling?

A. No.

Q. Just——

A. General minor repairs.

Q. What was her condition as to seaworthiness when she left your yard in January, 1910?

A. Why she was all right.

Q. In thoroughly good order throughout?

A. She was in good order, yes.

Q. In every respect?

A. As far as I could see she was.

Q. Well, was it a part of your duties to see that necessary repairs were done?

A. Why, yes.

Q. And you did so?

A. I did so; I put a part of my time on the vessel.

Q. Do you remember whether she was there in 1909, in July?

A. I don't remember the dates.

Q. Showing you this duplicate bill, does that refresh your memory?

A. This is 1909, July the 27th.

The Court: Refresh your memory by that.

A. (continued). Why, yes; I see about what we did to her, that is a part of it, I couldn't pick it all out; we made one new spar.

Q. What was the total amount expended in July, 1909, for the repairs?

A. Why it was \$687.

Q. No, July, 1909, the larger, longer sheet page?

A. Oh, yes, I see, this is \$379.

Q. And what was the cost of the repairs in the December and January repairs?

A. \$738.

Q. Do you remember the vessel being there in July, 1910?

A. Yes.

Q. Mr. Black, you now have in your hands duplicate bills of the repairs which were made upon the vessel in July, 1909, 77 December, 1909, and January, 1910, and in July, 1910. Can you testify as to what repairs, in a general way, were done to the vessel in that period of a year covered by the three bills?

A. Well, I could give you a part of it; I couldn't go into all the minor—

Q. Give us the general outline of it.

A. We put a rudder stock on the rudder, a new rudder stock; and we spliced the mizzen mast and overhauled her rigging; and we spliced two beams, I think they were hatch beams, and ironed same; and did some caulking; and we ironed her bow ports; and I couldn't give you the full details of the work, but we did quite a little work on her.

Q. Was the vessel in each instance on the dock?

A. I am not quite sure of that; I think she was.

Q. She was on the dock, was she not, at the July, 1910, repairs?

A. Yes, yes she was on the dock at that time.

Q. And was an examination made of her bottom and her seams at that time?

A. Yes.

Q. Was an examination also made of her deck and butts, waterways, and her seams on deck?

A. I think so, I am not sure of that, but I think they were.

Q. Did you see the vessel in each instance after the repairs were completed?

A. I did.

Q. What was her condition in each instance after the repairs were completed?

A. Why the vessel was in good condition.

Q. Give me the amount that was spent for repairs in each instance, starting with 1909, July.

The Court: He said that was \$379.

78 A. July, 1909?

Q. Yes.

A. \$697.03.

Q. December and January, 1910?

A. December 21 to January 7, 1910, \$738.90; July 8-14, 1910, \$678.91.

The Court: What was done at that time?

Q. I meant to cover by my question as to what was done to the vessel at your yard all three of the occasions on which she was there;

if you have not already included in your answer all that was done on all three occasions kindly add to your answer anything that you omitted.

A. July 27, 1909, she was hauled out and painted; she had some new shoes put on, and that was the time her hatch beams were put in; and we put in two new hatch beams, that is, spliced them in; made her spanker topmast, and overhauled the rigging; repairs to engine and boiler; searched and caulked where necessary, and general minor repairs. December 21, 1909, to January 7, 1910, new rudder stock; spliced mizzen mast, overhauled and renewed rigging where necessary, searched caulking on deck and top sides, repaired and reinforced one beam, examined and repaired the engine and pumps; general minor repairs. July 8 to 14, 1910, hauled out, cleaned, searched and copper painted bottom, and ironed ports, and small minor repairs.

Q. That was the January, 1910, repairs?

A. Yes.

Q. Go on and tell the Court, please, what was done in July, 1910.

A. I have already told that; do you want it repeated?

Q. Yes, repeat it, please, July, 1910.

A. She was hauled out, cleaned, searched and painted, and
79 at that time her ports were ironed, and small minor repairs.

Q. Will you kindly tell me what you mean by searched?

A. Why the caulkers go over and search the butts, and if any seams are slack they caulk them: it don't mean to caulk the entire vessel; it just means to search her out and caulk where necessary.

Q. To the end that she may be tight?

A. Yes.

Q. And what was the result of that searching and the repairs necessitated by it?

A. Why she was supposed to be made in good order.

Q. Not the supposition; was she as a matter of fact, tight, staunch and strong as a result of the July, 1910, repairs?

A. Why, yes, I should say she was.

Cross-examined by Mr. Englar:

It is noted that Mr. Goodrich hands Mr. Englar the bills which the witness has been testifying from.

The witness' memorandum is marked for Identification Exhibit — of this date.

Q. Is that your handwriting in pencil there, marked?

A. No, it is not.

Q. Whose is that?

A. Our clerk, our head bookkeeper.

The bills referred to are marked for identification Exhibits A, B, & C, of this date.

Q. You are testifying very largely, Captain, aren't you, from your records?

A. How so?

Q. I mean to say that a great deal of your testimony to-day is based on the records of your Company?

A. It certainly is.

80 Q. You wouldn't undertake to testify very positively as to the details of repairs that long ago, would you, from actual recollection now?

A. No, I could not.

Q. And when you say that certain work was done you are saying that as a superintendent; in other words, that you ordered certain work to be done, and the men were there, and you assumed that it was done; and in going around afterward and taking a general look, it appeared to you that it had been done; isn't that right?

A. That is right.

Q. And when you say, for instance, that the caulking was searched, of course you didn't search all the caulking on this boat?

A. No, I did not; that is not my business.

Q. And when you say that this boat was seaworthy, you are testifying simply as to your general impression of her from seeing her there on the drydock; isn't that right?

A. That is right.

Q. You can't say that the vessel was actually seaworthy in every detail, can you?

A. Why nothing more than from observation.

Q. And a more or less general observation, wasn't it?

A. Sure, yes.

Q. When a vessel goes on your drydock you have orders to do certain work, don't you?

A. We do.

Q. A vessel isn't put on your drydock and orders given to you to simply make that boat in all respects seaworthy; that isn't the way you get orders, is it?

A. No, we get orders to do certain jobs that needs repair.

Q. And you do those jobs, don't you?

A. We do, yes.

81 Q. You are not concerned with any other part of the vessel that you are not working on except in so far as if you saw anything obviously wrong about the vessel you would probably mention it; isn't that about it?

A. Yes, sir.

Q. But it is not your business, for instance, if you are ordered to repair a topmast, to go down in the hold and inspect a vessel all over for leaks, is it?

A. It is not.

By the Court:

Q. This painting the bottom; she had to be on the drydock for that?

A. Yes, sir.

Q. And therefore she was up where you could search and see about all the seams?

A. Yes; you can walk right under her.

Q. And that is a part of the work for which you charged in the bill?

A. Yes, sir.

By Mr. Goodrich:

Q. Is it a usual thing for a vessel 20 years old to have a straight keel?

A. No, it is not.

Q. What can you say about the keel of the Olcott as you saw her on the dock?

A. She went on straight blocks.

Q. She had a straight keel? She wasn't hogged?

A. Not hogged at all.

Q. And that isn't usual for a vessel 20 years of age?

A. I have her blocking in my pocket.

Mr. Goodrich: I don't care for it.

82 DAVID C. PREACHER, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Preacher, what is your business?

A. Chief engineer, Perth Amboy Drydock Company.

Q. Do you hold a degree as mechanical engineer?

A. Sir?

Q. Do you hold a degree as mechanical engineer?

A. No, not as mechanical engineer, no.

Q. What, civil?

A. Just chief machinist.

Q. How long have you been with the Perth Amboy Drydock Company?

A. About eleven years.

Q. And what have been your duties there?

A. Looking after machine work and boiler work, ship work.

Q. Do you have to do with the carpenters?

A. No, sir.

Q. Just the machinists, and boilers?

A. That is all.

Q. Do you remember the schooner Edith Olcott?

A. Yes, sir.

Q. Do you remember her being there on three occasions, July, 1909, December to January, 1910, and July, 1910?

A. Well, I remember her being there in December and January, of course. I remember her being there before, but what dates I couldn't say.

Q. Now, did you have occasion to do any work on the Olcott in your department in the December-January repairs?

A. Yes, sir.

Q. What did you do?

A. Well, we looked over the pumps and the engine.

83 Q. What did you do in connection with the repairs; you say you looked them over; what else did you do?

A. Well, they put some new valves in some of the pumps, and done a little bit engine work; there wasn't but a very little bit to be done.

Q. Were all the suction pumps of the schooner looked over?

A. Yes.

Q. And what was their condition found to be?

A. Why the pumps were found in good shape with the exception of some valves which had to be renewed.

Q. The pumps throughout the vessel were found to be in good shape?

A. Yes.

Q. Is this a correct description of the pumps on the Edith Olcott: There was an engine in the engine house; there was a wrecking pump run by that engine, that wrecking pump being in the engine house?

A. Yes.

Q. Outside of the engine house and immediately aft of the bulk-head forming the after part of it were the Messenger pumps. Near by was a circulating pump, and aft, or further aft, were two hand-pumps, one on the starboard side and the other on the port side, not far from amidships; is that correct?

A. Well, they were aft of amidships.

Q. And it was those pumps that you speak of and their suctions that in December, 1909, and January, 1910, were examined and found to be in good order?

A. Yes, sir.

Q. What have you to say as to the condition of the vessel as to seaworthiness at that time, in respect of her engines and pumps?

A. Sir?

84 Q. What have you to say as to seaworthiness of the vessel in respect of her engines and pumps at the time she left your yard in January, 1910?

A. I had nothing else to do with the vessel, with the exception of the engines and pumps.

Q. No, as to pumps only; was she in a seaworthy condition?

A. The pumps were in good shape.

Q. How long should those pumps have gone in the condition you saw them?

A. That all depends on the care the pumps get and the usage they get.

Q. Depending on average good usage how long should they have gone?

A. Well, they ought to run a couple of years any way, with good care.

Q. And with very good usage how long would they run?

A. You can never tell; a pump is liable to break down any time; a new machine is liable to break down any minute.

By the Court:

Q. What is the difference between the other pumps and the Messenger pumps?

A. The Messenger pump is run by a Messenger chain from the engine, and the other is a geared pump.

By Mr. Goodrich:

Q. Was the pump in the engine room known as a wrecking pump, run by a cog-wheel gear?

A. Yes, sir, it was.

Q. And the Messenger pump outside is run by a chain going through the bulkhead?

A. Yes.

Q. And a chain is geared on to a shaft, on a sprocket, from the Messenger pump?

A. Yes, sir.

Q. And a sprocket on the engine in the engine house?

A. Yes, sir.

By the Court:

85 Q. The difference is in the method of their propulsion, the pump is the same thing?

A. Well, there is a little difference in the construction of the pumps.

Q. But it works on the same principle, the same kind of pump?

A. Yes, sir.

Cross-examined by Mr. Englar:

Q. Did you personally do the work on these pumps?

A. No, not personally, no, sir.

Q. It was simply under your general supervision?

A. Yes, sir.

Q. Were you on board the vessel while the work was being done?

A. I was, several times.

Q. Several times, but not continuously?

A. No, I can't be there all the time.

Q. You have a number of different jobs under your charge all the time; isn't that true?

A. Yes.

Q. And you simply detail men to go and overhaul pumps on a certain vessel; then you drop around from time to time to see that they are at work; is that right?

A. Yes, and at times when they run across anything that isn't right they hold it off until I get there.

Q. Now did you personally see just what was done to each one of these pumps?

A. No, not everything that was done, no.

Q. For instance, take the hand-pumps; do you know just what your men did to the hand-pumps, if anything?

A. No, I couldn't off-hand now, it was so long ago, I couldn't tell you exactly what they did.

Q. You simply gave instructions for them to be overhauled, is that right?

A. To be put in first-class order.

86 Q. Are you positive that the hand-pumps were included in your orders?

A. Yes, sir.

Q. Both hand and steam?

A. Yes, sir.

Q. And when these men went to overhaul a hand-pump, assuming that they did their duty, what would they be likely to do?

A. They would take the valves out of the pump and examine them thoroughly to see that they were in shape, and try the pump afterwards, providing there was any water in the vessel to try it.

By Mr. Goodrich:

Q. Would they examine also the suction pumps and all the pipes to see whether they were in good order and not corroded?

A. Yes, sir.

Q. You got no report of any difficulty with any of the pumps whatever?

A. No.

Q. Did you get a report that they were in good order throughout?

A. Yes, sir.

Q. And that included the suction?

A. Yes.

By the Court:

Q. Did you examine the pumps when you were there in July, 1910?

A. No, sir.

Q. Did you examine them at all?

A. No, sir.

By Mr. Goodrich:

Q. What countryman are you?

A. Scotchman.

87 CORNELIUS H. CALLAGHAN, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Englar:

Q. Mr. Callaghan, you are an officer of the libellant corporation, are you?

A. Yes, sir.

Q. What is your position?

A. Secretary.

Q. That is a New Jersey Corporation authorized to do business in New York?

A. Yes, sir.

Q. Will you describe in a general way the character of business that that corporation was engaged in in the year 1910?

A. Well, the Benner Line was engaged in the shipping and commission business, principally the shipping business; we had a line operating to Porto Rico, with sailing vessels; the number of vessels we sent out yearly I forget, probably 60 or 75 vessels; we had our agents appointed at various points in Porto Rico, and we would work up cargoes down at Porto Rico, and also in New York, soliciting freight engagements; when we had sufficient freight to warrant us in chartering a vessel we would do so; we chartered vessels from various ship owners and maritime agents in the Maritime Exchange.

Q. Just continue, Mr. Callahan.

A. When we had sufficient freight engaged we would charter a vessel. Immediately upon chartering a vessel we would send a cable to our agent in Porto Rico, requesting him to notify all the consignees there; we would also immediately send out cards to the shippers in New York, to the extent of probably a thousand, or

188 fifteen hundred, or whatever number there were, and then we would take the vessel about a week or ten days in advance, before the time of loading, sometimes two weeks; when the vessel would arrive in berth the cargo would be ordered down; the vessel signed the receipts for the cargo, the mate's receipts, or in the absence of the mate, the captain might sign; and upon those receipts the bills of lading were issued; the bills of lading were signed usually by the master but they were our bills of lading.

Mr. Goodrich: I object, if your Honor please, and move to strike out the statement "they were our bills of lading."

The Court: I think that is a fact; they may not have been made out in their name.

Motion denied.

Q. Just proceed, Mr. Callaghan.

A. In order to save time I was explaining it that way. They were our bills of lading. In view of the fact that the mere signing of the bills of lading by the master we should have considered——

Mr. Goodrich: I object to what they considered.

Objection sustained.

The Court: Give us the facts.

Q. Mr. Callaghan, are you connected with the Maritime Exchange in any way?

A. I am.

Q. In what capacity?

A. I am a member of the Maritime Exchange; I have been a director for quite a few years; I have been Chairman of the Committee on Piers for eight or ten years—Piers and Bulkheads; I have also been Chairman of the Law Committee of the Maritime Exchange.

89 Q. Did you ever have occasion, Mr. Callaghan, in dealing with your various shippers, to recognize this bill of lading as yours, and if so in what way; tell us whether the question ever came up?

Mr. Goodrich: I object, if your Honor please, that it has nothing to do with this case.

The Court: Relating to other transactions with the respondents?

Mr. Englar: I am seeking to show what our relations are with shippers. Mr. Goodrich raises a question as to what relation our client held, and it seems to me material and competent to show that the Benner Line by a course of dealing had put itself in a certain position with the public.

The Court: Well, I don't think so. The right of the respondents must be determined by what they did.

Objection sustained. Exception.

Q. Before you chartered your vessel, Mr. Callaghan, before you got any goods down on the pier, had you any form of contract, agreement or understanding of any kind with your shippers?

A. Yes, in most cases we had written——

Mr. Goodrich: Answer yes.

A. Yes.

Q. Now will you state what was the practice in that respect?

Mr. Goodrich: I object to the question unless the contract, if in writing, is produced.

Mr. Englar: I don't know that I can show the terms of the contract unless it is produced; but I can show what the terms of the contract were, or simply that contracts did exist.

90 Mr. Goodrich: If contracts exist they must have terms.

The Court: Yes. If you want to show the general method of business with shippers generally, that is one thing; if you want to show contracts with the shippers in this case, that is another; and I think if the question there is what the contract was, you will have to produce the written papers. If you want to show generally how you did business with the shippers I don't think it is necessary to produce them.

Mr. Englar: That is all I am trying to do.

Q. What I am seeking to find out is by what arrangement or by what course of dealing you were enabled to have a cargo ready to put on these vessels that you chartered; in other words, had you made any arrangements tending to obtain a cargo?

Mr. Goodrich: Objected to as incompetent, immaterial and irrelevant, unless it is shown that such arrangements as the witness is prepared to testify to were made known to the respondents. I respectfully submit that the general course of dealing of the Benner Line is of no importance in this case. If my friend desires to question the witness touching contracts with any of the shippers whose names have been given away in the answers to the interrogatories, any written contract with those shippers, I shall not object to its production; but general arrangements I do strenuously object to, especially as they are not brought to the knowledge of the respondents.

91 The Court: My recollection is your question was pretty vague, and long, and double, and all sorts of things of that kind; I am inclined to admit the evidence which I think you want him to give.

Mr. Englar: I was trying to make my question as in-ocuous as possible, and perhaps I took all the meat out of it.

Q. Was it your practice in conducting the business which you have described, to contract in advance for the cargoes which you shipped on those vessels?

Mr. Goodrich: Objected to.
Objection overruled.

A. It was our practice to have a written contract signed so that we would be sure that we had the cargoes and that the shippers wouldn't divert the shipments after we took a vessel, and our instructions were to the freight clerk to have all the freight contracts signed in writing.

Q. Now, when you got enough freight accumulated to load a vessel I understand that you then sent notices around to the various shippers to bring their cargo to a certain place?

A. After we chartered a vessel and had a loading berth we sent out notices to bring their freight to the pier at which the vessel might be loaded.

Q. And who paid the rent or wharfage for the pier in that case?

A. We paid it.

Q. Who employed the stevedores to load in?

A. We employed the stevedores to load in.

Q. Did you at this time, Mr. Callaghan, carry advertisements in different papers in connection with your business?

A. We did.

92 Mr. Goodrich: I object to this testimony, if your Honor please.

The Court: I will take it; I overrule the objection.

Q. Did you maintain a more or less regular course of sailing to Porto Rican ports?

A. We did.

Q. And you advertised and solicited cargoes for those sailings in advance?

A. We did.

Q. Did your Company own any boats?

A. No.

Q. Chartered them all?

A. Yes.

Q. Charter them from one person or ship owners generally?

A. Ship owners generally, and ship brokers.

Q. Now in this particular case of the Edith Olcott, did you supply full cargo for the vessel?

A. We did.

Q. General cargo, all kinds of merchandise?

A. General cargo, miscellaneous cargo.

Q. Where were the bills of lading issued ordinarily, at what place?

A. From our office.

Q. You had your own form of printed bill of lading such as is annexed to the answer in this case?

A. Yes, sir.

Q. You said that ordinarily those bills of lading were signed by the master; was that on surrender of the mate's receipts?

A. Surrender of the mate's receipts or a guarantee from the owner that the receipts would be produced.

Q. In case of the absence of the master what was done?

A. In case of the absence of the master the agent might be called upon to sign them, or in case of the absence of either, why we would sign them ourselves; we generally asked to be authorized to do that; but to Gulf ports we invariably signed the bills of lading ourselves.

93 Mr. Goodrich: Gulf ports are not included in this case.

The Witness:

A. No.

Mr. Goodrich: And you don't make any claim that you signed any bills of lading in this case?

The Witness: Yes, we did.

Mr. Goodrich: In this case?

The Witness: Yes.

Q. I notice, Mr. Callaghan, that some of the bills of lading in this case are signed by a man signing his name J. De Brucher.

By the Court:

Q. Did you sign bills of lading when there was a demand for the ship; you always took the ship with the crew; they always furnished the crew?

A. Yes.

Q. And in those cases you always signed bills of lading?

A. Sometimes we might.

Q. There was no holding out to the public to ship out on these ships, was there; was the cargo all furnished by you?

A. Yes.

Q. You chartered the ship and filled it yourself?

A. Yes.

Q. And the ordinary public couldn't come there and tender their goods?

A. No.

By Mr. Englar:

Q. You had chartered the whole space of this vessel?

A. Yes, sir.

Mr. Englar: I don't know whether your Honor will care for this or not; I think it is something the Court knows, but I will ask the question to see whether it is material.

94 Q. I notice that where bills of lading were signed by persons other than the master in some cases they simply left the word "Master" there; in other cases the word "Master" was struck out; is there any custom or practice in this particular about the manner in which a person other than the master signing bills of lading should sign them; that is, as to the form in which they should be signed?

Mr. Goodrich: I object; this case is within the four corners of this bill of lading, copies of which we all have.

The Court: If there is any custom; I didn't understand it; I supposed it was the man who owned the ship who signed bills of lading.

Mr. Englar: If the master isn't there the bills of lading would be signed by us, if the master wasn't available.

Q. I asked you a question as to whether there was any custom?

A. It was our custom to have bills of lading signed by the master; that would be the proper way to sign them.

Q. I am asking whether that is a general custom which prevails in this port?

A. On vessels outside of the regular lines it would be the custom.

Mr. Goodrich: To what?

The Witness: To sign bills of lading "for the master."

Q. In other words, to write "for the master"?

A. Yes. The regular lines would probably sign by agents.

By the Court:

Q. Now how were the bills of lading filled out?

A. In our office.

Q. And you put in the name of the actual shippers here,
95 under Benner Line?

A. They are made up and sent to us for our manifest.

Q. Do they get the form from your office?

A. Yes, sir; we don't accept any other except our own.

By Mr. Englar:

Q. To whom was the freight paid for these shipments?

A. Paid to us.

Q. To you?

A. Yes.

Q. Did the owner of the vessel or her agents have anything to do with the freight paid for these cargoes?

A. Nothing at all.

Q. You paid a lump sum for the vessel and got what you could for the cargo?

Mr. Goodrich: Why don't you put the charter in evidence?

It is stipulated that the copy of the charter party annexed to the answer may be put in evidence.

Q. (Repeated:) You paid a lump sum for the vessel and got what you could for the cargo?

A. Yes, we chartered the vessel on the basis of a lump sum, based on her dead weight capacity, probably at \$2 per ton; if the vessel carried 1800 ton, it would probably be \$3600, lump sum, we paying the wharfage and port charges at destination; our customary form of charter.

Q. You made your own arrangements with the shippers?

A. Yes, and made any difference we could.

Q. Did the owners of the ship have anything to do with fixing the rates?

A. Nothing at all; they signed the bills of lading without prejudice to the charter party.

96 Cross-examined by Mr. Goodrich:

Q. Mr. Englar showed you, but did not offer in evidence, one bill of lading which was signed by John De Brucher. Who is John De Brucher?

A. Bill of lading clerk at that time.

Q. And in signing that, in what capacity did he sign?

A. Well he signed the bills of lading; he was our bill of lading clerk at the time, and I presume that we probably called up Pendleton Bros. and they probably couldn't come over to sign the bills of lading, and they told him to sign, as the shippers were anxious to get them.

Q. In other words it is the ship's bill of lading whether signed by Pendleton Bros., De Brucher or the master?

A. The master signed the bills of lading, but we consider, and always have considered that the bills of lading are ours; if there was any loss the shipper would present a claim to us.

Mr. Goodrich moves to strike out the answer as not responsive.

Q. Is it a bill of lading by which if signed by De Brucher the Benner Line issues a bill of lading assuming the responsibilities named in the bill of lading?

A. The bills of lading are signed without prejudice to the charter party.

Q. Yes, but answer my question, is that the ship's bill of lading, in your opinion, or is it the Benner Line's bills of lading?

A. It is the Benner Line's bill of lading, because we would hold the ship responsible on the mate's receipt.

Q. No. Here are certain goods shipped on board this vessel, and in respect of those goods somebody is under obligation to do some things, namely, safely to carry the goods; now but one person
97 or entity can be responsible for that shipment, for the carriage of the goods and their delivery at Mayaguez or San Juan; was it you or the ship that assumed that responsibility?

A. We signed the bills of lading and——

Q. Was it you or the ship that assumed that responsibility?

Mr. Englar: Objected to.

A. The shipper would hold us responsible regardless of who signed the bills of lading.

Mr. Goodrich moves to strike out the answer.

Q. Is it the ship or the Benner Line that agrees to perform that contract of carriage?

The Court: If you ask such a question as that you will have to take his answer.

Q. I show you two bundles of bills of lading, every one of which is signed by Pendleton & Company, and I ask you if those are not the bills of lading for this vessel; kindly look them over, compare

them with the list of shippers in the answer to the interrogatories, if you so desire, and——

A. I would have to check those bills of lading off before I could answer that.

Q. I desire to have them checked off.

Mr. Englar: We can check them off between us.

Mr. Goodrich: I want the witness to check them off.

The Court: Let a clerk or someone check them off while you go on.

Q. Isn't it true, Mr. Callaghan, that Mr. Pendleton told you that Captain Fletcher, who had been in charge of the Olcott during her loading, was going away to Boston to be married?

98 A. I don't remember distinctly; Captain Fletcher; I believe, did leave the vessel during the loading.

Q. After the loading was completed?

A. Yes; I don't remember exactly.

Q. And do you remember asking to have him sign the bills of lading and Mr. Pendleton's saying that he wasn't to be gotten at for that purpose?

A. Very probably that was so.

Q. And do you remember Mr. Pendleton coming around to your office with one of his clerks and signing the bills of lading which I have just handed to you?

A. I don't know how many bills of lading, but I do know that Mr. Pendleton signed a great many.

Q. Didn't he sign all of the bills of lading which I now hand you and which I now state are all the bills of lading for this vessel?

A. Our clerk signed some bills of lading over there, and I don't quite understand the difference without going into the matter.

Q. The bills of lading which I have are captain's copy bills of lading?

A. I don't know.

Q. Stamped by you; are they not all of them stamped "Captain's Copy," and are they not all signed "Pendleton Bros."?

A. I will have to look at them.

Q. Kindly do.

A. These bills of lading which you hand me seem all to be signed "Pendleton Bros.," our clerk's name is scratched off in two instances; whether they are all the bills of lading of the cargo I can't tell.

Mr. Goodrich: I offer in evidence these bills of lading, all of which are signed "Pendleton Bros.," the Captain's copy, and will state that so far as I know they cover the entire cargo; I will have them compared, and if there are any exceptions I will have

99 them corrected. Marked Exhibits D and E.

Mr. Englar: It is quite agreeable to me.

Q. Is Mr. De Brucher here?

A. No.

Q. Has he left your employ?

A. He has left our employ.

Q. He signed in his individual name, didn't he?

A. Yes.

Q. He didn't put "Benner Line," or "For Benner Line" on any of the bills which are signed in this case?

A. No.

Q. So far as De Brucher is concerned it is his own signature?

A. Absolutely.

Q. And in no way is there anything in the bill of lading to hold the Benner Line?

A. I don't know that there is anything surrounding his signature.

Q. Did you authorize De Brucher to sign these bills of lading?

A. Did we?

Q. You personally?

A. No, I didn't personally.

Q. And you say the practice was for the shippers to deliver at the ship the goods, room for which had previously been engaged and for the mate or someone in behalf of the ship to give to the shipper a receipt therefor; upon the surrender of that receipt at your office generally, perhaps always, the bill of lading would be given to the shipper and the receipt surrendered?

A. That is the custom.

Q. Was that done in the case of the Edith Olcott?

A. So far as I know, yes.

Q. Have you in your possession the form of receipt which the mate signed and gave to the shipper, or would that be the shipper's own receipt?

A. No, those receipts are surrendered to us and we probably have them in the office.

100 Q. Do you know whether you have the receipts of the Edith Olcott?

A. Not positively, but I believe we must have.

Q. Don't you remember Mr. Pendleton or Mr. ———, or Mr. Pinkney asking you to give them a bundle of receipts, and your neglecting so to do?

A. I don't remember; I think Mr. Pendleton said something about it.

Q. So far as you know they never received them?

A. So far as I know the receipts are available.

Q. At the time the Edith Olcott was chartered did you have some discussion with Mr. Pendleton as to her insurability?

A. Yes, sir.

Q. Did you have in mind and did you speak of another vessel, the Smith?

A. Yes, sir.

Q. The Henry J. Smith was her name?

A. Yes.

Q. Was she a vessel of about the same age as the Olcott?

A. As far as I remember about the same age.

Q. Wasn't she younger than the Olcott?

A. I wouldn't be sure about it; the records will show.

Q. Did you have some discussion as to the relative rates of insurance on the Smith and the Olcott?

A. I don't remember, I presume we did at the time, must have.

Q. Were you notified by Mr. Pendleton that the vessel would be hauled out at Perth Amboy where the inspectors could see her?

A. I think Mr. Pendleton said something to that effect at the time.

Q. And did you communicate that knowledge to the inspectors?

A. We must have.

Q. Mr. Brewster of the Providence-Washington among others?

A. I would like to recall that; I don't believe we gave
101 any information to any inspector; we would make an application to either the Atlantic Mutual for insurance on the vessel or to the Providence-Washington; with her we insured a small portion of the cargo.

Q. Did you insure in the Atlantic?

A. The Atlantic was our regular Company, and before chartering a vessel we would apply for insurance; if they accepted it we would insure it.

Q. Did you cause it to be known to the Insurance Companies or their agents, without regard to the inspectors, that the vessel could be inspected for insurance by prospective shippers?

A. I couldn't recollect at this time what we told the Insurance Company; one of the clerks would generally attend to them.

Q. What sort of rates would you usually get from the Insurance Companies?

Mr. Englar: If Mr. Goodrich thinks that is material I won't object, but I think it is going pretty far afield to put in the rates. Objection overruled.

The last question is stricken out.

Q. What sort of rates did you get for the Edith Olcott and the cargo laden on board of her, or her freights?

A. So far as my recollection is we insured at the regular rates.

Q. Are there any possible lower rates than were obtained on the Edith Olcott for a vessel of her age?

A. Not if she insured at the regular rates.

Q. At the regular best rates; isn't it so?

A. Yes.

Q. No better rates were to be obtained than the Edith
102 Olcott obtained for a vessel of her years?

A. No.

Q. Did you have occasion to find out, or did you find out, what class she had in the American Bureau of Shipping?

A. I don't remember that at the present time, that is a matter that we sometimes look up, but usually leave to the Insurance Companies to accept or reject a vessel.

Q. Didn't you find it necessary to bind the owner to present a vessel that could get insurance?

Mr. Englar: That is another step farther afield, if your Honor please.

Objection sustained.

Q. Did you yourself go down to Perth Amboy to look at the vessel while she was out?

A. No, sir.

Q. Do you know whether any of the inspectors of the Insurance Companies did?

A. No, sir.

Q. Where is Mr. Brewster, the inspector of the Providence-Washington?

A. Mr. Brewster——

Mr. Englar: Mr. Brewster will be here to-day.

A. (continued). I don't know him.

Redirect examination by Mr. Englar:

Q. In answer to the seventh interrogatory which was filed in this case you said that the libellant was the owner of certain merchandise enumerated therein; that is the fact, isn't it?

A. That is a fact, yes sir.

Q. The shipper, a man named Oettinger, was employed in your office?

A. He was employed in the office, and the bill of lading was made out in his name for trade purposes.

103 By Mr. Goodrich:

Q. From whom did you purchase the Oettinger lumber?

A. Probably Whitman, Skilling & Bond; but the invoices would disclose that information.

Q. I would like that?

A. I presume we have it available in the office.

Q. Did your concern, the libellant here, pay the purchase price of that lumber to the seller thereof?

A. We paid the purchase price and collected it at the other end.

Q. I don't think you collected it from the other end?

A. No, I don't think we did.

Q. You collected about two-thirds of the freight of this vessel in advance, did you?

A. I believe we did.

Q. Have you repaid it to the shippers?

A. No, sir.

Q. You were not obliged to, were you?

A. No, sir.

Q. And you made money by the sinking of the Olcott, didn't you?

A. I don't remember.

Q. You got advance freight and weren't compelled to pay \$3500 for the charter?

A. Yes, we did.

Q. You made money by the sinking of the Olcott. Have you been called upon to pay any damage on account of this loss?

A. No, sir.

By the Court:

Q. Are these bills of lading outstanding in the hands of the shippers?

A. The bills of lading are outstanding in the hands of the shippers and the consignee has as many copies as he desires; we send one to the consignee and one is filed for Custom House purposes possibly.

104 By Mr. Englar:

Q. They are still outstanding?

A. Yes.

By Mr. Goodrich:

Q. And as to the freight prepaid did you insure it?

A. I should say probably, yes.

Q. And you collected the insurance on the non-prepaid freight?

A. I don't know. The freight that was not paid?

Q. That was not prepaid?

A. I don't remember positively; that is a matter which I will have to look up.

Q. Well, will you look it up?

A. What is your question again?

Q. As to the freight prepaid; did you insure it? Didn't you insure in the Atlantic profits on the charter in the sum of \$1705?

A. Yes.

Q. And would that include all freights not prepaid?

A. That would be the difference between the charter party and the bills of lading I should say.

Q. There is another Atlantic profits insurance, namely July 13th, profits on charter \$1098?

A. That was probably—I would have to look those matters up to state positively.

Q. I think that you did look them up and gave Mr. Englar—

A. Let me see that, Mr. Goodrich, please.

Q. Yes, let him see that. Mr. Callaghan, did you have insurance on the profits of the charter for about \$2800 in the Atlantic?

A. About, as far as I know.

Q. And did you collect that insurance?

A. Yes sir, we collected whatever insurance was due there.

Q. And therefore you collected, as far as this voyage of
105 the Edith Olcott is concerned, about two-thirds of the freight

in advance and \$2800 from the insurance company on your insurance of profits?

A. About that.

By the Court:

Q. Have you no arrangement with the holders of these bills of lading with regard to your bringing this suit? What is to prevent the holders of these bills of lading from suing the owners of the ship on the bills of lading?

A. We have been requested by the underwriters, in the first place the Providence-Washington, we had seven or eight thousand dollars of insurance placed on goods that we had, and they complained of these claims; they practically made a loan to us in order that they would have the right to do so and no one else; and they elected to avail themselves of that; the various other underwriters, four or five on behalf of the shippers, also wanted to come in the action, as otherwise there would have been seven or eight individual suits, and we had no other alternative but to allow our name to be used in the suit; but in reality we have no great interest in it. I believe that is my understanding of the case.

Mr. Englar: I have a complete set of the bills of lading on which we are proceeding, and I offer them in evidence.

By Mr. Goodrich:

Q. Did you ever with your underwriters, who requested you to bring this action, discuss this writing on the back: "12. Also it is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper or consignee, the carrier shall have the full benefit of any insurance that may have been affected upon or on account of said goods?"

106 Did you call that to the attention of the Insurance Companies when they asked you to bring this suit?

A. No, sir, we are the carriers of the goods.

Q. How is the obligation created?

A. By the charter party; the bill of lading is signed——

Q. And under the charter party your claim is that you are the carriers?

A. We are the carriers as far as the shippers are concerned.

Q. That is your claim, is it?

A. Yes, sir.

Q. And in no other way than arises from the charter party?

A. At the moment I don't know of any other way.

Q. You have just stated, have you not, Mr. Callahan, that no shipper or consignee has requested you to bring this suit?

A. No shipper or consignee has requested us to bring this suit, no, sir.

Q. What Insurance Company has requested this action?

A. I will have to make—the Insurance Company of North America, Firemen's Fund, Mannheim Insurance Company, St. Paul Fire & Marine Company, the Providence-Washington.

Q. Have they requested you in writing?

A. I believe they have; as to that I am not positive.

Q. Have you the letter, or whatever form the request was in?

A. I presume we have; I would have to look that matter up.

Q. Kindly look that up too. Have the Insurance Companies agreed to pay the expenses of this suit?

A. They have.

Q. And to hold the Benner Line free?

A. Yes, sir, we are not assuming any responsibility.

Q. Have some Insurance Companies refused to join in this
107 suit, Insurance Companies which were insurers of this vessel?

A. I have no knowledge of it.

Q. Didn't the Atlantic?

A. I have no knowledge.

Q. Didn't the Boston refuse to join?

A. I have no knowledge.

Q. That would be in the more particular knowledge of Mr. Englar or Mr. McGee?

A. I should think so.

Mr. Goodrich: Now, your Honor, we have the original charter party here.

Q. Mr. Callaghan, is that the original charter party which I show you, on page 253 of book entitled on the back "Charter Parties, 5, Pendleton Bros., 1908-1910"?

A. Those are the original charter parties.

Q. Did you say something about the Insurance Companies having made you a loan?

A. The Providence-Washington paid their claim in the form of a loan; they loaned the money.

Q. And you obligated yourself to repay the \$7,000 or whatever the sum was?

A. The form of that particular document I don't remember at the time.

Q. Well have you a copy of it?

A. I don't know as we have a copy of it; they probably have it; I don't think we have, we may have.

Q. They haven't paid you the loss, though?

A. They paid us the loss; they paid it in that way.

Q. You have the money, but you are under obligation to return it in certain contingencies?

A. I don't know the form of the document.

Mr. Englar says he has it.

The Court: That was done to keep the title in Pendleton
108 Bros., instead of being subrogated to the Insurance Company?

Mr. Englar: That is it. I offer in evidence the depositions of William George Smith, Richard Ward, Gustav A. Linder and John Gustav Green. Those four depositions, your Honor, complete my case. I would like to move at this time to amend my libel by simply setting up the fact that the Benner Line was in addition to the other

facts stated, the owner of a certain shipment of goods. I didn't know that and it escaped my attention, but we stated it in interrogatories filed about a year ago; it is not a matter of surprise, but I would like to have it appear in the record.

Mr. Goodrich: If your Honor please, in the testimony of Linder I move to strike out that part of Linder's testimony which states conversations with Green; I will explain that as follows: Linder was on the vessel for a day or two before she sailed——

Mr. Englar: I consent; it is not material at this time, it may become so later.

Mr. Goodrich: And may be stricken out?

Mr. Englar: For the time being.

Mr. Goodrich: I move to strike out also Green's talk with the cook.

Mr. Englar: I agree to that as not material at this time. I am also willing to have stricken out the answer of William George Smith to my fifth interrogatory; I think it is highly incompetent and immaterial.

109 Mr. Englar: One amendment which I spoke of the other day I would like to put in form. I wish to amend the third sentence of article 5th of the libel by adding thereto the words "and was at all such times the owner of the following portion thereof, to wit." Then follows the merchandise enumerated in the answer to the seventh interrogatory.

The other amendment is as follows: I wish to amend the last line of the list annexed to the libel marked Exhibit A, by inserting the words "bundles of" after the figures 250. The ditto mark was omitted there by the stenographer.

Mr. Goodrich: I have no objection to the second amendment, but as to the first it seems to me it is pretty radical.

The amendment is allowed.

Exception.

110 *Interrogatories Proposed to be Propounded to William George Smith.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually, Respondents.

Please Take Notice, that annexed hereto is a copy of the interrogatories proposed on behalf of libellant to be propounded to William George Smith under commission heretofore directed to be issued.

The original of said interrogatories was this day filed with the Clerk of this Court to be annexed to the said commission.

Dated New York, May 31st, 1912.

Yours, etc.,

HARRINGTON, BIGHAM & ENGLAR,

Proctors for Libellant.

64 Wall Street, New York City.

To Henry W. Goodrich, Esq., 49 Wall Street, Proctor for Respondents.

111 *Direct Interrogatories to William George Smith.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against.

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually, Respondents.

Interrogatories to be Addressed under and by Virtue of the Annexed Commission to William George Smith as a Witness for the Libellant Herein, to be Answered by Him under Oath.

First Interrogatory.

(a) What is your full name, age and place of residence? (b) What is your occupation? (c) If in answer to the preceding interrogatories you state that you are a seaman, state how long you have followed the sea, in what capacity, and in what class or classes of vessels.

Second Interrogatory.

(a) Were you on board the steamer "King Edgar" on August 6th, 1910, and if so, in what capacity? (b) On or about the said date do you recall having sighted a schooner flying signals of distress, and if so, state the name of the schooner? (c) Did you go on board of such schooner? (d) If you say that you went on board of such schooner, state, in a general way, the condition in which you found her. (e) State whether you made any examination of her pumps, and if so, state in detail the condition in which you found them to be, including in your statement both the steam and hand pumps. (f) If you saw the pumps working, state whether they were working effectively, and describe, in detail, the manner in which they worked. (g) If you have stated that the pumps were not in good condition, state whether you were able to judge how long they had been in bad condition. (h) If you state that you were able to judge how long the pumps had been out of condition, state how long, in your judgment, the pumps had been so out of condition, giving the reasons upon which your opinion is based.

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Third Interrogatory.

(a) State whether any application was made by the master of the said schooner for salvage services to be rendered by the steamer "King Edgar." (b) State whether any salvage service- were rendered to the said schooner by the steamer "King Edgar," and if so, state at length the nature of said services, how long they continued, and the result thereof. (c) If you state that any efforts were made by the "King Edgar" to tow the said schooner to New York, and that such efforts were unsuccessful, state what, in your opinion as an experienced seaman, was the cause of the failure of such efforts. (d) If you have stated in response to the last question that such efforts were unsuccessful, state whether, in your opinion as an experienced seaman, the condition of the pumps of the said schooner was in any way responsible for the failure of such efforts, and if so, in what way. (e) If you state that the condition of the
 113 schooner's pumps was in any way responsible for the failure of such efforts to tow her to New York, give at length your opinion as an experienced seaman as to whether or not the said schooner could have been towed to New York if her pumps had been in reasonably good condition, and whether, if her pumps had been in reasonably good condition, the said schooner could have made port without assistance. (f) If you state in answer to the last preceding question that the schooner with her pumps in a reasonably good condition could have made port without assistance, give your opinion, as an experienced seaman, as to how many or how few of her pumps would have been necessary to enable her to do so. (g) State the weather conditions which existed during the time the "King Edgar" was in the vicinity of the said schooner.

Fourth Interrogatory.

(a) Were any statements made to you by any officers or members of the crew of the said schooner, and if so, state in detail just what was said by such officers or members of the crew.

Fifth Interrogatory.

(a) Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If so, set forth the same fully and at length in your answer.

HARRINGTON, BIGHAM & ENGLAR,

Proctors for Libellant.

114 *Cross-interrogatories to be Addressed to William George Smith.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against.

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually, Respondents.

First Cross-interrogatory. Please state fully how you came to be on the Schooner Edith Olcott. How long did you remain on her?

Second Cross-interrogatory. State what pumps the Edith Olcott had? Where were they situated? What was their size? Give a full description of each of said pumps separately, use, location and size?

Third Cross-interrogatory. If you say that any of said pumps was out of order give a full description of it; telling in detail how and why it was out of order?

Fourth Cross-interrogatory. Have you read or heard read the direct and cross-interrogatories before the questions were asked of you by the commissioner? If you say yes, state when and with whom you read or heard read such interrogatories? Was a copy of them or either of them sent to you before your appearance before the
115 commissioner? Have you made a statement in writing in this case? If so, to whom did you hand such statement and where is it now if you know?

Fifth Cross-interrogatory. What conferences have you had with Messrs. Harrington, Bigham & Englar, the proctors for the libellant, or any one in their behalf or representing them?

HENRY W. GOODRICH,
Proctor for Respondents.

49 Wall Street, New York City.

Answers of William George Smith to Interrogatories.

KINGDOM OF GREAT BRITAIN AND IRELAND,
County of Lancaster, City of Liverpool,
Consulate of the United States of America, ss:

Deposition of a witness, produced, sworn and examined, the twenty-sixth day of June, in the year one thousand nine hundred and twelve at the Consulate of the United States of America, in the City of Liverpool, County of Lancaster, England, under and by virtue of a Commission issued out of the District Court of the United States for the Southern District of New York, in a certain cause therein depending, and at issue, wherein the Benner Line is Libellant, and Fields S. Pendleton and Edwin S. Pendleton, co-partners transacting business under the firm name of Pendleton Brothers, and Fields S. Pendleton, individually, are Respondents:

WILLIAM GEORGE SMITH of 23 Nigel Road, Peckham, London, aged 26 years and upwards being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellant, doth depose and say as follows:

1. To the First Interrogatory he saith:

(a) William George Smith; 26 years old; 23 Nigel Road, Peckham, London.

(b) I am an Able Seaman.

(c) I have followed the sea in sail and in steam since I was 15 to the age of 26.

2. To the Second Interrogatory he saith:

(a) I was on board the steamer "King Edgar" on the date named as an Able Seaman.

(b) I remember sighting a schooner flying a signal of distress. her name was the "Edith Olcott."

(c) I went on board such schooner.

(d) I found her in a leaky condition; the Captain asked if we would tow her for a sum of £3,000 for which I signed my name, also the Mate and another witness. He asked the crew if they would go back; they said they had had enough of her, and they would not go back. She was in a leaky condition, not in a fit state to be at sea; she had only been one week out from New York.

(e) I made an examination of the pumps, I saw them myself; they were in a rusty condition, the pipes were corroded, and if you put your hand against them they were liable to fall away and break. That refers to the hand pumps. The steam pumps were in a condition that they would not suck; one which was working was in a bad condition owing to the gipsy chain having no connecting links, and it was in a very poor state; it would not have lasted if we had tried to tow her back to New York.

117 (f) I saw one pump working, the others would not work at all owing to the pipes having holes in them. They would not suck. The one pump that was working was not throwing enough water to keep the ship afloat; if one of the wrecking pumps had been working it might have kept the ship afloat, or both the wrecking pumps. Owing to the gipsy chain being in a rotten condition it kept breaking and there were no links to repair that.

(g) You could see the pumps had not been used, and were left in a bad condition; if they had been overhauled before the cargo had been put in the ship the "Edith Olcott" would have been afloat to-day.

(h) The pumps had been out of condition for a good time, a very long time I should say; they were corroded with rust.

3. To the Third Interrogatory he saith:

(a) The Master of the schooner asked us to sign an agreement to tow his vessel for £3,000. I signed my name to a paper to that effect.

(b) We towed her for a matter of about 12 hours, from about six on Saturday afternoon until about six on Sunday morning; we then found the water gaining on us and we had to leave.

(c) The cause of the failure of such efforts was the water gaining upon us. We knew that before very long she would sink under us, so we left her after setting fire to her cabin; the water was gaining on us rapidly.

(d) The cause of the water gaining on us was that the pump was not able to throw enough water to keep her afloat; if other pumps had been able to throw water, even the two wrecking
118 pumps, we would have kept her afloat; the one that was working was an old-fashioned pump.

(e) She could have been towed to New York if her pumps had been in reasonable good condition, and could have made port without assistance; if the pumps had been in any way in a good condition she would not have wanted our assistance.

(f) Two pumps would have been sufficient—the wrecking pumps would have been sufficient.

(g) It had been rough weather, but it was calming down; the sea was very high at the time on the Sunday morning after we left her, but in the afternoon the water was as calm as anything, practically smooth water.

4. To the fourth Interrogatory he saith:

I got from the crew that they joined the "Edith Olcott" at about an hour's notice; after signing on they were ordered down on board the ship at once, not knowing what the pumps were like. I do believe if the schooner had been unloaded, and the crew had seen the pumps they would not have gone in her.

5. To the Fifth Interrogatory he saith:

From what I heard from the Mate and crew I think the schooner was mostly sent to sea to be lost intentionally because it looked very funny when we were in Erie Basin to see her Captain, after he had lost her, pass us, and wave his hand in another schooner in such a short time.

Cross-interrogatories:

1. To the First Cross Interrogatory he saith:

We left the "King Edgar" to go the "Edith Olcott" to see what was the matter with her. I remained on her from about
119 half-past one on the Saturday till about seven in the morning of Sunday.

2. To the Second Cross Interrogatory he saith:

She had three steam pumps to my knowledge; the steam pumps were forward in the house along with the donkey boiler; there were two wrecking pumps and a gipsy—I could not say exactly their size—they were pretty big pumps; the wrecking pumps were bigger than the Gipsy pump, the other hand pumps were old-fashioned the wrecking pump was next to the donkey boiler within about three yards, a messenger from that wrecking pump was on to another small steam pump, the wrecking pumps were both the same size; the messenger pump was about three or four yards away. The fourth pump was on the fore side of the main, the other one I noticed was well aft; the two last were old-fashioned hand pumps; one that

was lying in the waterways was corroded with rust. It seemed to me they had had it out to inspect it, but that it was no use to parcel or try to repair it, because the least touch would have broken it.

3. To the Third Cross Interrogatory he saith:

My idea was the pipes were rotten so that they would not suck—all the pumps. You could not examine the pipes because the cargo was all round about them; you could not get down into the hold to see what they were like.

4. To the Fourth Cross Interrogatory he saith:

No, I have never read nor heard read the Direct or Cross Interrogatories before this moment, nor has a copy of them or either of them been sent to me. I have made a statement; before we left the ship there was a bit of writing passed, a bit of a statement, and

I was asked if I would sign my name. I was asked if it was correct. I said it was correct in every way as to the condition of the ship. I gave that statement to Mr. Ward, the Chief

Officer of the "King Edgar"; I understood it was in case anything was going to be fetched up before the Court. That statement is now in my possession, and I wish it to be attached to my evidence,—marked "Exhibit W. G. S."

5. To the Fifth Cross Interrogatory he saith:

I did not know that Messrs. Harrington, Bigham & Englar were concerned in this case; all I knew was that Messrs. Batesons, Warr & Whimshurst were acting as Agents for a firm of American Lawyers. I have seen Messrs. Alfred Bright & Sons, the London Agents of Messrs. Batesons, Warr & Whimshurst, on several occasions, the first of which was on the 25th April 1912.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 26th day of June 1912, before—

[SEAL.]

WM. G. SMITH.

HORACE LEE WASHINGTON,

*Commissioner, Consul of the United States
of America at Liverpool, England.*

"EXHIBIT W. G. S."

William G. Smith, Witness.

" S. S. "King Edgar."

NEW YORK, 26th Aug., 1910.

We the undersigned hereby testify the following to be a true statement of the conditions of the pumps, used for pumping ship, as found by us when on board the schooner "Edith Olecott," Aug. 6th, 1910, Lat.

121 The hand pumps were useless, the starboard pipe of hand pumps was laying on deck one mass of rust, the pipe so

frail and full of holes caused by corrosion, it was impossible to parcel or repair it.

Steam wrecking pumps useless—unable to draw any water, owing to condition of pipe under deck leading to hold.

Ordinary steam working pumps in poor condition and not working at full speed, owing to poor condition of gipsy chain, which was thin and frail, repeatedly breaking and no repair links on board.

We are confident that had even one pump, either hand or steam, been in an efficient condition, the schooner could have made port without any assistance whatever.

RICHARD WARD,
Chief Officer.

JOHN ANDERSON, A. B.
H. DANIELSEN, A. B.
WM. G. SMITH, A. B.
N. OLSEN, A. B.

[Printed on left margin:] Libellant's Exhibit 7. Oct. 13/13.

KINGDOM OF GREAT BRITAIN AND IRELAND,
County of Lancaster, City of Liverpool,
Consulate of the United States of America, ss:

At the execution of a Commission for the examination of witnesses, wherein the Benner Line is Libellant and Fields S. Pendleton, et al., are Respondents, this paper writing was produced and shown to William George Smith, the witness, and by him deposed unto at the time of his examination, before

[SEAL.]

HORACE LEE WASHINGTON,
Commissioner, Consul of the United States
of America at Liverpool, England.

122 *Interrogatories Proposed to be Propounded to Richard Ward,*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners,
Transacting Business under the Firm Name of Pendleton
Brothers, and Fields S. Pendleton, Individually, Respondents.

Interrogatories to be Addressed under and by Virtue of the Annexed Commission to Richard Ward as a Witness for the Libellant Herein, to be Answered by Him under Oath.

First Interrogatory.

(a) What is your full name, age and place of residence? (b) By whom are you employed and in what capacity? (c) If in an-

answer to the preceding interrogatory you state that you are employed as officer of a vessel, please state how long you have followed the sea; what license or licenses you hold, and how long you have held the same. (d) State what experience you have had as an officer of various classes of vessels, and what stations you have held at various times on such vessels.

Second Interrogatory.

(a) Were you on board the steamer "King Edgar" on 123 August 6th, 1910, and if so, in what capacity? (b) On or about the said date do you recall having sighted a schooner flying signals of distress, and if so, state the name of the schooner? (c) Did you go on board of such schooner? (d) If you say that you went on board of such schooner, state, in a general way, the condition in which you found her. (e) State whether you made any examination of her pumps, and if so, state in detail the condition in which you found them to be, including in your statement both the steam and hand pumps.

Third Interrogatory.

(a) State whether any application was made by the Master of the said schooner for salvage services to be rendered by the steamer "King Edgar." (b) State whether any salvage services were rendered to the said schooner by the steamer "King Edgar," and if so, state at length the nature of said services, how long they continued, and the result thereof. (c) If you state that any efforts were made by the "King Edgar" to tow the said schooner to New York, and that such efforts were unsuccessful, state what, in your opinion as an expert navigator, was the cause of the failure of such efforts. (d) If you have stated in response to the last question that such efforts were unsuccessful, state whether, in your opinion as an expert navigator, the condition of the pumps of the said schooner was in any way responsible for the failure of such efforts, and if so, in what way. (e) If you state that the condition of the schooner's pumps was in any way responsible for the failure of such efforts to tow her to New York, give at length your opinion as an expert navigator as to whether or not the said schooner could have been towed to New York if her pumps had been in reasonably good condition, and whether, if her pumps had been in reasonably good condition, the said schooner could have made port without assistance. (f) If you state in answer to the last preceding question that the schooner with her pumps in a reasonably good condition could have made port without assistance, give your opinion, as an expert navigator, as to how many or how few of her pumps would have been necessary to enable her to do

Fourth Interrogatory.

(a) Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If so, set forth the same fully and at length in your answer.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

125 *Cross-interrogatories to be Addressed to Richard Ward.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually, Respondents.

First Cross-interrogatory. Please admit fully how you came to be on the Schooner Edith Olcott? How long did you remain on her?

Second Cross-interrogatory. State what pumps the Edith Olcott had? Where were they situated? What was their size? Give a full description of each of said pumps separately, use, location and size?

Third Cross-interrogatory. If you say that any of said pumps was out of order give a full description of it; telling in detail how and why it was out of order?

Fourth Cross-interrogatory. Have you read or heard read the direct and cross interrogatories before the questions were asked of you by the commissioner. If you say yes, state when and with whom you read or heard read such interrogatories? Was a copy of them

126 or either of them sent to you before your appearance before the commissioner? Have you made a statement in writing in this case? If so, to whom did you hand such statement and where is it now if you know?

Fifth Cross-interrogatory. Did you not have a conversation with Fields S. Pendleton of New York and Captain William J. Fletcher, formerly master of the schooner Edith Olcott at Norfolk, Virginia, in the year 1911? If so state fully what was said by you or either of them? Did you not state on that occasion that the pumps of the Edith Olcott at the time that you saw them were in good order and were pumping water? Did you not also state that the pumps which had been working well had been stopped at the time you abandoned the vessel?

Sixth Cross-interrogatory. What conference have you had with Messrs. Harrington, Bigham & Englar, the proctors for the libellant, or any one in their behalf or representing them?

HENRY W. GOODRICH,
Proctor for Respondents.

49 Wall Street, New York City.

127 *Answers of Richard Ward to Interrogatories.*

RICHARD WARD says:

I am at present third officer of the steamer "Veronese" belonging to Messrs. Lamport & Holt. I have a Master's certificate and have held one for 14 years. I was chief officer of the S. S. "King Edgar" in August, 1910. On the 6th August, 1910, the "King Edgar" was in the course of a voyage from Huelva to New York and when in latitude 37.3 deg. N. Long. 65.3 deg. W. we sighted a large four masted schooner showing signals of distress. I saw she was flying the American flag jack down and at half-mast. She also had 2 flags at the mizzen which were made out to be the International Code Signal "N. V." and from our code book I gathered this meant "Short of provisions Starving"; I found out later that by the signals in the older book, it meant "I am sinking."

We went alongside and hailed the schooner which proved to be the "Edith Olcott." We learnt that the schooner was sinking and that the Captain and crew wished to be taken off. We told them to lower a boat and come on board. Some of the crew as stated in the log, came aboard in their own boat—a motor launch of which the motor was useless—and some remained on the schooner. We were informed by the Mate of the schooner that the Captain wished to negotiate for a tow. He also said that the schooner had aboard a general cargo of cement, machinery, etc., and was 6 days out from New York bound for San Juan, Puerto Rico.

As soon as the men from the schooner had come on board our vessel I went aboard the schooner in our own boat with 4
128 men. There were 4 men still aboard the schooner with the Captain of her when we reached the vessel. When I reached the vessel with my men I spoke to Captain Wallace of the schooner and he reported to me that there was 8 feet of water in the hold and that he had one steam pump working which was keeping the water under but was unable to reduce it. After further conversation it was agreed that we should endeavor to tow him to New York for \$15,000 and Captain Wallace signed an agreement to that effect which I witnessed. As soon as I had the contract signed I took it back in our boat to the "King Edgar" and then we started to get the ropes ready. We passed the lines for the towing hawser with our own boat. We made fast to the schooner's chain cable our steamer's wire hawser and paid out about 30 fathoms of the schooner's cable and a full length of towing hawser. Altogether between the two vessels there was a scope of about 800 to 1000 feet.

The 4 men that went on board the schooner with me were, John Anderson, H. Danielson, W. G. Smith and N. Olson. We sighted the schooner about 10.30 A. M. and we started to tow at about 4.30 P. M. I myself with my men boarded her at noon.

All the time that we were getting the ropes ready one steam pump on board the schooner was working; this pump was in the well deck forward. The pump kept breaking down and stopping owing to the gipsy chain breaking.

As soon as we had started towing I thought it advisable to make a thorough examination of the pumps on board the vessel in view of her leaky condition. I first examined the hand pumps and was much surprised to find the starboard hand pump suction
129 pipe lying on the deck one mass of rust with innumerable holes caused by corrosion. I was told by the Master it had been drawn up the previous day as neither the port nor the starboard hand pumps would pump any water and seeing the condition of the starboard suction pipe, it is reasonable to assume the port suction pipe was in a similar condition. Going forward to the engine house to convince myself that the steam pump was doing its full work, I was astonished to see the mere dribble of water being pumped; the Master informed me it was the best they could do—there was plenty of noise, but very little work. As I have said the gipsy chain of this pump was frequently breaking. Entering the engine-room I found the gipsy chain used in the working of the outside steam pump slipping the gipsy wheel at almost every turn, a man being stationed attempting to make the chain catch on the wheel by pushing waste between the chain and gipsy wheel. The links of the gipsy chain were very thin and worn, no doubt through years of usage, or some other usage other than use on this particular pump as the chain was much too long. The links were continually breaking and being repaired with anything at hand. There were no spare links on board.

I asked the Master why the wrecking pump had not been working. He informed me he had repeatedly tried to use it but it would not pump one drop of water. Procuring a lamp I went below in the hold to examine the steam pump suction pipes and I was alarmed to find them in the same condition or nearly so as the hand pump suction pipes, one mass of rust. The suction pipes of the wreck-
130 ing pumps had been patched with canvas above the level of the cargo inside the casing, which had recently, apparently been broken away and below that numerous holes could be felt and matches inserted in numerous places. In such a heavy seaway with the vessel lurching violently and with a disheartened number of men, it was impossible to remove sufficient cargo to remedy the above defects.

I noticed that the decks of the schooner were leaking very badly and with the labouring of the vessel the butt ends of the deck planks were opening and closing continually and the decks continually flooded; much water found its way below from this source and when I was below I could hardly find one dry patch on the surface of the cargo, except in spaces just below the deck-houses.

We towed from about 4.30 on the afternoon of the 6th August until about 5.45 A. M. on the 7th August when the tow rope parted. I noticed that during the night the schooner had begun to make more water no doubt opening some of her forward seams and I think that the probable cause of this was the towing. It was blowing very heavily during the night and she was burying herself up to the foremast, although the "King Edgar" was only steaming slow speed. We kept the steam pump working all night, but we could not use

any of the other pumps owing to their bad condition. When the tow rope parted the "King Edgar" came back to us and hailed us to lower our boat and abandon the schooner as quickly as possible; I therefore got into the boat with my men and the Master and 4 men who were on the schooner came with us. We went back to the

"King Edgar" and left the "Edith Olcott"; the time was then
131 about 6 A. M.—when we got back to the "King Edgar."

Just before leaving the schooner I drew the fire and stopped the pump working and took as many of the hatches off as I could so that the vessel should sink as quickly as possible and not remain afloat a danger to navigation.

We had had ordinary weather previous to sighting the "Edith Olcott," and I think if her pumps had been in order she could have made port without any assistance whatever.

I confirm the statement which my 4 men and myself signed on the 26th August, 1910, in New York; we signed this statement for Messrs. Convers & Kirlin, attorneys in New York for the owners of the "King Edgar;" they stated they wanted it for the protection of the owners' interests.

In my opinion the "Edith Olcott" was unseaworthy by reason of the state of the pumps on board her, although she appeared to be unseaworthy in no other respect except for what I have stated about the decks. Apart from the pumps and the decks, I think she was a well-found schooner. I am sure from what I saw of the pumps they must have been in a bad condition when the vessel started on her voyage; as already stated the schooner was only 6 days out when we sighted her. The pipes were quite corroded which could not happen in such a short time, and the Master told me that before they could get the suction pipe of the starboard hand pump up on deck for inspection they had to get the throat halyard of the jigger on to it as it was so much rusted in.

RICHARD WARD,
Late Chief Officer S. S. "King Edgar."

132 *Deposition of Gustav A. Linder.*

United States District Court, Southern District of New York.

BENNER LINE
vs.
FIELDS S. PENDLETON.

Deposition of Gustav A. Linder, Taken on Behalf of the Libellant, at the Offices of Messrs. Harrington, Bigham & Englar, No. 64 Wall Street, New York, on the 28th Day of September, 1912.

Present: Messrs. Harrington, Bigham & Englar (Mr. Englar) for the libellant;

Henry W. Goodrich, Esq., for the respondent.

It is stipulated that the testimony may be taken by a stenographer; signing filing and certification being waived; stenographer's fees to be a taxable disbursement.

GUSTAV A. LINDER, being duly sworn, deposes and testifies, as a witness for the libellant:

By Mr. Englar:

Q. What is your business?

A. I am acting engineer on board steamers.

Q. Do you hold any license?

A. Mate's license, for sailing vessels.

Q. For what territory?

A. Any territory; all oceans.

Q. Mate's license for all oceans on sailing vessels?

A. Yes.

Q. How long have you been working as an engineer?

133 A. About seven years now; seven years on an engine on this coast, and I served an apprenticeship for two years in the old country.

Q. You have been serving as engineer how long?

A. Seven years; I was apprentice in a machine shop in the old country for two years.

Q. In the latter part of July, 1910, did you go on board the schooner Edith Olcott?

A. Yes, sir.

Q. Where was she lying?

A. At Pier 11—I don't know exactly what pier, but she laid opposite, nearly abreast of the Old Ship; I don't know exactly what pier it was.

Q. What was your business on her?

A. Well, I met the shipping master, Hall, and he offered me to get a job to go in her as engineer.

Q. Did you go on board with Mr. Hall?

A. Yes, sir, I went on board and spoke with the captain first, on the wharf, Captain Fletcher, I think was his name; he told me that he wanted a man that didn't drink and would attend to his business. So I said all right, if he was so particular about a man I am going to be just as particular myself, and have a look how the engine will go. So when I came aboard I saw John Green in the engine room; but I didn't know he was aboard; I thought there was no one else on board; so I said, "Hello, John; what is the matter with you not going——"

Objected to.

Mr. Englar: I agree that this testimony as to conversations with John Green are not material at this time, but I wish to take the testimony de bene esse on the ground that it may be material later. Unless it is connected in some way, or becomes relevant, I agree

134 that it should not be offered in evidence. I wish to take it subject to your objection at this time.

A. (continued). —because it struck me as funny that he was going ashore——

Q. Don't tell us what you thought; just tell us what happened.

A. Any how he said he wouldn't go, because she was in such an awful mess. So I looked around and saw what kind of mess she was

in. First, her boiler was brine salted; the salt came out of all the hand hole plates and all packing connections everywhere, and she had only one pump for fresh and salt water, and, of course, John told me that all the packing and everything was broken down and he couldn't get no packing; he said he asked Captain Fletcher, or who ever it was, if he could get some packing and he couldn't get no satisfaction. So he said he wouldn't go in her, because she wasn't in no condition. Well, I didn't look around much, because I saw what pumps she had, and, of course, I couldn't tell what kind of condition the pumps were in because I didn't look at the pipes. So Hall came up and asked me if everything was all right, and I told him that, in the very words, "No, thank you; get some one else, I ain't going." I want to say that I was six weeks on shore and I would have taken most anything, but I wouldn't take that.

Q. You were anxious to get a job, were you?

A. Yes, I was anxious to get a job.

Q. Did you consider the vessel safe to go to sea in?

A. Not by what I seen of her.

Q. Will you describe briefly and in a general way, what her pumping equipment consisted of?

A. She had nothing but power pumps.

135 Q. Just what do you mean by that?

A. Well, there was a wrecking pump in the engine room.

Q. How did that work?

A. It worked with a shaft; winch and all had to go around.

Q. How was the power transmitted from the shaft to the wrecking pump?

A. With a cog wheel.

Q. That cog wheel was on the winch shaft?

A. On the winch shaft; on the main shaft, yes.

Q. What else did she have besides this wrecking pump?

A. Well, she had what we call a fly wheel pump; it pumps outside the house and the power is transmitted by either a rope or a chain from the same shaft.

Q. That is, from the winch shaft?

A. From the winch shaft, yes.

Q. That rope or chain runs out through the side of the house?

A. Through the after part of the house.

Q. Did she have some hand pumps?

A. I couldn't tell you, but I suppose she did; but I didn't worry about hand pumps.

Q. Is that not in the engine department?

A. No; I had nothing to do with it.

Q. Who has charge of the hand pumps?

A. Well, the mate is supposed to look after the hand pumps; she had a small duplex pump in the engine room for fresh and salt water.

Q. What is that pump for?

A. Well, it is for the purpose of washing decks down and to prime the wrecking pump, and in her case to feed the fresh water from the between deck tanks into the feed tanks.

Q. You spoke a moment ago about her having only one pump for

fresh and salt water. In what way is that material?

136 A. Well, because you can't help getting your boiler salted; you use her now for washing the decks down, and a little while afterwards you have to use it to pump water from your tanks into the feed tank, and I would like to know how you keep the salt out of the pump. You are bound to get brackish water in your boiler.

Q. In view of the condition of the boiler which you saw, and the character of the pumps, did you consider that the boiler could supply power to run those pumps?

A. No, it could not; not from the boiler, because the salted boiler was bound to foam, and the minute it foams you can't prime your cylinders and instead of using your steam you have hydraulic.

Q. You have water in your cylinder?

A. You have water in your cylinder and you can't get no power.

Q. How are modern pumps or pumps which you consider efficient, run; how is the power transmitted to them?

A. Well, there is a pump and an engine all at once; they call them duplex pumps. The steam pressure overcomes the water pressure; there is an engine by itself; there is no moving parts to it, you know.

Q. In other words you simply run the steam into the pump direct?

A. The pressure of the steam on the steam cylinder overcomes the steam on the water cylinder; we call them direct acting duplex pumps.

Q. Are all modern pumps built that way?

A. Yes; on board a vessel; of course, on shore they have got power pumps, but on board a vessel they all use duplex pumps now.

Q. With such pumps do you have to run a winch?

A. No; nothing at all; you can pump anywhere on board a vessel independent of connections.

137 Q. Can you move it around to wherever you get a steam pipe to reach it?

A. Provided you get a suction pump down in the hold. You can have a pump in any part of the vessel.

Q. Did you later sail with Captain Wallace?

A. Yes, I shipped with him; after the loss of the Olcott I shipped with him in the Willie H. Child.

Q. Did he say anything to you about the Olcott at any time?

Objected to.

A. He told me—I didn't know the man when I shipped with him; I didn't know who was acting master at that time, but he told me, "Chief, I want you to go on board as soon as you can and see if there is all the necessary packing on board, because I don't want to get in the same mess as in the Olcott." Those were his very words. That was the time that I knew he was the master.

Q. Did you know before that that he had sailed in the Olcott?

A. No, I didn't know anything about it. I never heard of him in my life before.

Q. In old fashioned pumps do you have to have special packing, or can you pack them with anything you have at hand?

A. No; with old fashioned pumps you have to have—in engine rooms in some vessels now they are drove by cog wheels; there is special pressed leather for it; of course if you have got none on board, that settles it; you can't use the pumps. Of course, I couldn't tell what pumps she had; if it had been Edson's pumps you have to have special rubber packing for it.

Q. Some have to have special rubber packing and some have to have special leather packing?

A. Special leather packing; for the hand pumps you have to have special rubber packing.

138 Q. With modern pumps, such as the Blake and Worthington do you have to have special packing?

A. Well, there is special packing for it; but if you run short most anything will do; you can have square flax in it, sinnet. But now in case you have not packing on board you can put anything in it; make it out of manila rope yarn; that would do.

Q. You are speaking now of the modern Blake and Worthington pumps?

A. Yes, the modern Blake pumps.

Q. Is that true of these old fashioned pumps?

A. No.

Q. You have to have special packing for them?

A. Yes, you have to have special packing made for them.

Q. Have you had experience during the last seven years pretty continuously with various kinds of pumps and boilers on board the coasting vessels of the United States?

A. Yes, sir.

Q. Have you had experience with salted boilers and modern pumps and old fashioned pumps?

A. Yes, sir, I have been using salted pumps at different times on boilers.

Q. Do you know the effect of it?

A. Well, the first you know the boiler is corroded, and you can never get the power out of it; if you know how to handle a salt water boiler you can make out better than a man who doesn't know anything about it.

Q. How could you tell that this boiler was salted?

A. You could see the outside; all the hand holes, there were lumps of salt hanging there as big as your fist.

139 Cross-examination by Mr. Goodrich:

Q. How old are you?

A. Thirty-seven.

Q. How long have you been in this country?

A. Since 1896.

Q. 1896 or 1906?

A. 1896.

Q. In what vessels have you sailed?

A. I couldn't give you no list; there must have been forty or fifty of them.

Q. Give me as many as you can.

A. Well, I can give you the latest vessels; the George M. Grant—

Q. Whom does she come to?

A. She belongs to New Haven. To Weaver; Manson & Benedict Company.

Q. When did you sail in her?

A. Well, I left her when I shipped in the Olcott; five weeks before I shipped in the Olcott I left her.

Q. Did you sail in the Olcott at all?

A. No.

Q. Did you ship in the Olcott?

A. Well, Hall brought me down to go in her, you know.

Q. Did you actually ship in her?

A. No, I didn't sign articles.

Q. And you didn't go in her?

A. No.

Q. When do you say you were in the Grant?

A. Well, I left her about five weeks before that time, and I was in her 20 months.

Q. 20 months before you saw the Olcott or after you saw the Olcott?

A. No; I went in the Grant 20 months before I saw the Olcott.

Q. When did you see the Olcott?

A. Well, that was in July, 1910, when I went aboard of her down here.

Q. You are sure of the date, are you?

A. Well, I think it was in the month of July; I know I left, I think, the 18th of August, and I don't know how long I was
140 on shore after I went on board the Olcott and didn't go in her; it must have been the latter part of July or the beginning of August.

Q. Where was the Olcott lying?

A. She laid up somewhere close to—about abreast of 52 South Street.

Q. Now name any other boat that you have been in on this coast?

A. The Zack Sherman.

Q. Whom does she come to?

A. She belongs to New Haven too; to the same concern

Q. How long were you in her?

A. Going on 28 months.

Q. When?

A. I have got my discharge from her, but I couldn't tell you when I joined her.

Q. Well, about the time.

A. Well, I joined her about a year and a half before the panic was.

Q. The panic of 1907?

A. Yes; in 1906.

Q. What other vessels have you been in?

A. I have been in the Maud Palmer.

Q. Whom does she belong to?

A. She belongs to Winslow.

Q. Of Portland?

A. Of Portland.

Q. When were you in her?

A. I jointed her in January last year, and left her in October.

Q. How big are the vessels that you have named as compared with the Edith Olcott?

A. Well, the George M. Grant is, I think, 1200 net; and I think the Sherman is 750 net and the Maud Palmer I think is 1400 net.

Q. What sort of pumping outfit did the Sherman have?

A. Well, she only had one—no, she had two pumps; one wrecking pump and a duplex pump and a smaller pump to wash decks; a duplex pump also.

141 Q. Were these both steam pumps?

A. They were both steam pumps, yes.

Q. What did the Grant have?

A. She had a power pump drove by a cog wheel, the same as the Olcott; she had one Hyde pump in the between decks.

Q. Where was this pump?

A. In the between decks.

Q. What did the other vessel have?

A. You are going to make something out of this between decks; the George M. Grant—

Q. What was the name of the third vessel that you gave me?

A. The Maud Palmer.

Q. What did she have?

A. She had a wrecking pump in the between decks and two pumps in the engine room.

Q. What sort of wrecking pump was that?

A. Her wrecking pump was a Hyde pump.

Q. Are you going to sea now?

A. Yes, sir.

Q. In what boat?

A. The Percy Birdsall.

Q. Whom does she come to?

A. I couldn't tell you.

Q. Who shipped you? Hall?

A. No; Pitt.

Q. How did you come to give this testimony?

A. Well, because some fellow down in South Street knew that I was on board and he asked me if I would go up to the lawyer.

Q. Who was the fellow?

A. A fellow by the name of Herman Kettlesen.

Q. What is his business?

A. He was a sailor.

Q. In what vessel?

A. He got drowned last year; last winter.

Q. When did he tell you about wanting you to come to the lawyer's office?

A. When I came back from Captain Wallace, from Pensacola.

142 Q. How did you happen to meet this man?

A. Well, he stayed in the same house where I stayed; at least, he was always there, and he was a good friend of mine; I met him every time I came here.

Q. What did he say to you?

A. He asked me—he said, "You have been in the Olcott and would you mind giving you testimony as to what you seen in her."

Q. How did he know that you had been in her?

A. He was around there in the mornings; he was around the shipping office.

Q. He was around the shipping office all the time, from morning till night.

A. He was at that time.

Q. What office did you come to?

A. I came to Mr. Englar; that is all.

Q. You came to this office?

A. To Mr. Englar.

Q. When did you come?

A. Well, it was in November the same year.

Q. That is, November, 1911?

A. No, November, 1910.

Q. Did you make a statement to Mr. Englar at that time?

A. Yes, sir.

Q. A statement in writing?

A. Yes.

Q. Did you swear to it?

A. Yes.

Q. Have you been paid anything for making a statement, or for testifying?

A. No.

Q. Do you expect anything?

A. No, I don't expect anything.

Q. You don't expect anything at all?

A. No; only that I had my carfare across this time.

Q. Did Hall have anything to do with your coming up here? Did you talk with him about it?

A. No, sir.

Q. Did you talk with anybody but Mr. Kettlesen?

143 A. I didn't know anything about the case at all; I knew the vessel was lost and that is all I knew.

Q. (Repeated.) Did you talk with anybody but Kettlesen?

A. No.

Q. Nobody else?

A. No.

Q. And it was Kettlesen that got you to come up here?

A. Yes, sir.

Q. Did he tell you there was any money in it?

A. He didn't say anything to me about it.

Q. And it is just pure friendliness to Kettlesen that brought you up here?

A. Yes.

Q. No hope of reward on your part for anything?

A. No; it is immaterial to me.

Q. Just pure kindness of heart?

A. That is all.

Q. What was Kettlesen's job?

A. Well, he used to go before the mast, and that summer he happened to be in New York.

Q. Just a common sailor?

A. Yes, sir.

Q. What countryman was he?

A. He was German.

Q. Where did he board?

A. He boarded over in Brooklyn.

Q. What street; do you know?

A. No.

Q. The only place that you met him was in Hall's office?

A. Oh, no; I met him in South Street; he used to come and have meals in the same house I stayed.

Q. Where was that?

A. 29 South Street.

Q. Who keeps the house?

A. A man by the name of Herman Bourn.

Q. Do you belong to the Seamen's Union?

A. No.

Q. To no union at all?

A. I used to, when I used to go before the mast.

144 Q. How long since you have been a member of any union?

A. About a year and a half.

Q. Were you a member of the union when you saw Kettlesen?

A. Yes, sir.

Q. Was he?

A. I think he was; I can't say for sure.

Q. What union was it?

A. The Atlantic Coast Seamen's Union.

Q. Did you talk with any of the officers of that union?

A. No, sir; I didn't pay no attention to it for the last six or seven years, to the whole concern.

Q. You are sure of that, are you?

A. I am sure of that; they used to beg me to pay my dues, and I said, "What's the use? It is only a fake; but," I said, "it is only seventy cents a month, and it won't break me;" so I used to pay; but I didn't attend any meetings.

Q. And you have not been a member of any other union?

A. No, sir.

Q. Was Kettlesen a member of the union?

A. He used to be.

Q. Was he at the time you had the talk with him?

A. Well, I suppose he was, but I ain't sure about it.

Q. Wasn't he a representative of the union?

A. I don't know if he was at that time; I know he had been before.

Q. You know, as matter of fact, that he was at that time?

A. At that time, no; he was at times before; but I had been away 10 months at that time, and I couldn't keep track of him.

Q. Who first suggested that you go and look at the Olcott?

A. For me to go and look at the Olcott?

Q. Yes.

145 A. No one suggested it at all; Hall came up to me and asked me if I was going to ship and I said, "Yes; what have you got," and he said, "Do you want to go in the Edith Olcott" and I said yes, and when I came aboard it happened as I say.

Q. Who is John Green?

A. Well, he goes engineer on this coast here.

Q. How old a man is he?

A. I guess he is 42 or 43.

Q. Did he go in the Edith Olcott?

A. No, sir.

Q. Had he ever been on her in the capacity of engineer, or otherwise?

A. Well, he was on her three or four days.

Q. Had he ever sailed on her, I mean?

A. Not to my knowledge.

Q. Is he a member of the Union?

A. No, sir.

Q. You are sure of that, are you?

A. I am sure of that; he is not.

Q. Did you know Green before that?

A. Yes, sir, I knew him for the last five or six years.

Q. Where is he now?

A. Well, I know he shipped last winter in the Agnes Manning; I think that was the one he shipped in.

Q. Is he in her now?

A. I don't know; I heard he wasn't in her any more.

Q. How long since you have seen him?

A. Since this last January.

Q. 1912?

A. 1912.

Q. What was he in then?

A. Well, he was on shore, and he shipped in the Manning.

Q. And you haven't seen him since?

A. No.

Q. Where were you when you had your first talk with Hall about shipping in the Olcott?

A. On South Street.

Q. On the street?

A. On the street, yes.

146 Q. What time; was it before you went on board the vessel?

A. I went on board right away.

Q. Do you mean within 10 minutes?

A. I mean within 10 minutes. I had no clothes with me; I just went on board.

Q. What part of South Street were you in?

A. It was near Coenties Slip; it may have been outside his office in Coenties Slip.

Q. And you were looking for a job?

A. Yes.

Q. Had Hall ever shipped you before?

A. No, Hall had never shipped me before.

Q. How did Hall know you?

A. Well, I was around there and was looking for a job, and I spoke to him different times; times were dull you know, and a few days previous to that I said, "If you know of anything, let me know."

Q. Weren't you in front of the union when Hall met you?

A. No, sir.

Q. Wasn't the union hall right near where the vessel lay?

A. No, sir.

Q. Where was the union hall?

A. 52 South Street.

Q. Wasn't that right near where the vessel lay? You say she lay in front of 52 South Street.

A. Yes; but I wasn't at the union hall; I couldn't help getting near it by going down to the river.

Q. Weren't the pumps on the Olcott the usual pumps for a vessel of her size and age and class?

A. Yes, for her size and age and class, they were the usual pumps.

Q. What pumps do you say she had?

A. She had a wrecking pump in the engine room and a power pump outside.

Q. You didn't look at the hand pumps aft?

A. No, sir.

147 Q. Where was the power pump?

A. Well, on the after part of the house; the after part of the forward house, drove by a rope or chain; I don't know which it was drove with.

Q. How many pumps did she have run by messenger chains?

A. Only one; that is, it was a double pump, you know.

Q. How many chains?

A. Only one chain.

Q. How many pipes led to the hold?

A. Well, it must be two pipes.

Q. Then there were two pumps, weren't there?

A. Well, two pumps working at one time.

Q. And that is distinct from the wrecking pump?

A. Yes, that is distinct from the wrecking pump.

Q. And you didn't look at the hand pumps at all?

A. No.

Q. Could you see anything of the pipes in the examination that you made?

A. No, sir, nothing of the pipes.

Q. How long were you on board?

A. Oh, I suppose about 25 minutes; a half an hour at the longest.

Q. What was it that made you make up your mind not to go in her?

A. The boiler.

Q. And that is because you saw that the boiler had foamed?

A. The boiler was full of salt.

Q. You didn't look inside the boiler, did you?

A. No, I didn't have to look inside of her.

Q. What was the appearance that you saw of the boiler that determined you not to go in her?

A. Well, there was lumps of salt hanging all over.

Q. What was it? A horizontal or an upright?

A. An upright boiler.

148 Q. How big a boiler was it?

A. Well, I should think either 30 or 38 inches.

Q. Was it in the middle of the forward house?

A. No; it set on the port side.

Q. You say that the outside of the boiler was coated with salt, do you?

A. Well, not the outside of the boiler; but where the pipe connections went into the boiler.

Q. You saw salt on the pipe connections that went into the boiler?

A. Yes, and on the hand hold plates that lead into the boiler.

Q. What are those?

A. They are for the purpose of cleaning the boiler out and washing it out.

Q. And those were all covered with salt, were they?

A. Yes, those were all covered with salt.

Q. How long was this before the Edith Olcott sailed, do you know?

A. I couldn't say.

Q. And the presence of the salt there indicated to your mind that she had only one pump for fresh and salt water?

A. Well, I seen that pump.

Q. And you saw that?

A. Yes, sir.

Q. And you knew, therefore, that there must be salt inside the boiler, didn't you?

A. Yes, sir.

Q. Did you ever hear of a foaming boiler still continuing to work?

A. They have continued to work, yes sir.

Q. And you have worked a foaming boiler, haven't you, many times?

A. Yes.

Q. Is there any trouble about it?

A. Yes, there is trouble about it; in that George M. Grant we used salt water one trip because we run short of fresh water; it worked, but instead of being able to heave 105 fathoms of chain it

in 20 minutes it took us an hour and a half to heave in 75 fathoms of chain.

149 Q. In other words there was loss of power?

A. There was loss of power, and they had to shut it down.

Q. Yet pumps would still work with salt water, like that?

A. Yes, they would work, but it all depends on how a man takes care of the boiler.

Q. If a boiler has a little salt in it in consequence of salt water having gone through the pump doesn't it tend to clear itself when fresh water is used to feed the boiler?

A. No, it couldn't; the salt would stay in there.

Q. How do you clean a boiler then?

A. Well, blow the boiler out and wash it out.

Q. How long does that take?

A. Well, there are two kinds of cleaning——

Q. How long does it take, I say?

A. There is two ways.

Q. Answer my question. How long does it take to clean it?

A. To wash it out?

Q. Yes.

A. Well, you can wash it out in 20 minutes, but the whole process would take longer than that.

Q. If there is plenty of fresh water on board the fact that there has been salt water in the boiler before that time is no harm to the ship, is it?

A. Why sure it is.

Q. Why?

A. How can you go and get salt water out?

Q. You have just told me; by cleaning the engine.

A. Are you going to do that at sea?

Q. Do it before you leave.

A. Oh, yes, do it before you leave.

Q. Then there was no trouble about the boat, that you saw, except that there was salt there, salt on the outside around the pipes, indicating that salt water had been used in the boiler; that is true, isn't it?

A. Yes.

150 Q. And it was perfectly possible to clean that boiler before she left?

A. Oh, yes, sure.

Q. Then your whole criticism of that vessel is that she had used salt water in her boiler?

A. She had salt water on her boiler; not used it.

Q. Well, she had used it and there was indication that she had used it in her boiler?

A. No; but she had it in her boiler at the time.

Q. That is the only criticism that you had to make of her?

A. Yes, sir.

Q. Did you see Captain Fletcher at the boat?

A. Yes, sir, he stood on the wharf when I came with Hall, and he called Hall down about a cook that he sent him; that was the only time I saw him.

Q. Whom did you see on the vessel?

A. I saw no one but John Green, except the stevedores.

Q. I mean of the crew of the vessel?

A. No, no one.

Q. Did you have a talk with Fletcher before you went on board?

A. No; the only thing, he told me he wanted a man that didn't drink and knew something about his business.

Q. That is absolutely all that you discussed with Fletcher before you went on board?

A. Yes; I told him that I wasn't going in her.

Q. Anything else; did you get the impression that Fletcher was choosing the crew?

A. I never knew the man before, and I didn't worry anything about that.

Q. You knew he was the captain, didn't you?

A. Yes, I knew he was the captain.

Q. And in charge of the vessel?

A. Yes, in charge of the vessel.

Q. Did you know that there had been any trouble between the owners of the Olcott and the union?

A. No.

151 Q. You didn't know that at all?

A. No; I don't bother myself about such things.

Q. Did you have any talk with Fletcher after you came from the vessel?

A. No, sir, I didn't see him.

Q. Then the whole talk that you had with him was a moment's talk before you went on board?

A. That is all.

Q. Did he ask you if you were a member of the union?

A. No.

Q. You are sure of that, are you?

A. I am dead sure; he didn't ask me anything at all. In fact he hardly paid any attention to me, because he had an argument with Hall about the cook.

Q. Did you tell Fletcher your name?

A. No, sir, I didn't tell him my name.

Q. Did you tell him you were an engineer?

A. No, I didn't even say that much, because Hall came and introduced me to him; he said, "Captain Fletcher, I have got an engineer for you;" so Captain Fletcher said, "I want a man that don't drink and to attend to his business;" then he turned right around to Hall and called Hall down about the cook.

Q. Did he say anything about a union man?

A. No, nothing about a union man; it wasn't mentioned at all.

Q. You are sure of that?

A. I am sure of that.

Q. No talk between Hall, you and Captain Fletcher about the union?

A. Nothing mentioned about the union at all.

Q. How long after your visit to the Olcott, which you have described, did you ship?

A. Well, it couldn't have been any more than two weeks.

Q. Had the Olcott sailed at that time?

152 A. The Olcott had sailed and they had come back again; the ship-wrecked gang came back before I went away.

Q. Were you around South Street day by day while the Olcott was loading?

A. Day by day, yes.

Q. Do you know of any trouble, fight and so on, about the crew?

A. No, sir.

Q. The union?

A. I don't know anything about that.

Q. You never heard anything about that?

A. No, sir; I very seldom got as far as where she laid by the wharf there.

Q. Were you around union headquarters at the time?

A. No.

Q. Did Hall ever ship you?

A. No.

Q. Did Pitt ship you?

A. He always shipped me.

Q. Nobody else beside him?

A. Well, they simply used to keep a shipping office down here.

Q. Did you ever ship through Pitt?

A. Yes.

Q. And Low?

A. He was a partner with Pitt.

Q. Pitt & Low was the firm?

A. Yes.

Q. Did you ever ship at any other office?

A. Yes; Wyman shipped me at that time; but that is years ago.

Q. And recently you have shipped always with Pitt & Low?

A. Yes.

Q. Pitt & Low ship only union men, don't they?

ask A. Well, I don't know much about the men, you know; he don't us engineers and cooks whether we belong to the union or not.

Q. Does Hall ship any union men?

A. He ain't particular what he ships as long as he gets them.

Q. You are sure about that?

A. I think so.

153 Q. Don't you know that Hall doesn't ship anybody but non-union men?

A. Well, we had four men last trip, union men.

Q. Shipped by Hall?

A. Shipped by Hall.

Q. In what vessel?

A. In the Percy Birdsall.

Q. Did they belong to the union or the American Seamen's Federation?

A. They belonged to the union.

Q. What is the name of the union?

A. Atlantic Coast Seamen's Union.

Q. Do you mean to say that you could throw in 105 fathoms of chain in 20 minutes?

A. In 17 minutes.

Q. Have you done it?

A. Yes, sir, and Captain Jaynes standing there behind me.

Q. Where was it?

A. In the George M. Grant, anchored off Cape Hatteras, and anywhere along the beach here; I have done it not once but——

Q. This particular time that you made this test.

A. Well, I couldn't exactly tell you where we were anchored, but he timed her often.

Q. How much steam did you have to do it with?

A. 105 pounds of steam.

Q. And how much chain did you haul in?

A. 105 fathoms in 17 minutes.

Q. Do you mean to say that she was anchored with 105 fathoms?

A. She was anchored with 105 fathoms on one side, yes, sir.

Q. Why?

A. It was blowing so hard.

Q. When and where was this?

A. Well, I will tell you it was in a Thanksgiving gale at that time; that was one time.

Q. What year?

A. It was the same year with—the same year we had that Christmas blizzard. When was that?

154 Q. I am asking you questions; not you me.

A. I can't tell you; I can't keep track of all the dates.

Q. How many pounds of steam does it take to run a steam pump such as the Olcott had?

A. Well, I will tell you, we have got the same pump in this vessel and——

Q. Answer my question.

A. I couldn't tell you; I never run a pump.

Q. You never run a pump?

A. Not her pump; no.

Q. You have seen pumps like hers?

A. Well, I was just going to state that the pump on this vessel is the same make, and it will take 55 pounds of steam to run it.

Q. Don't you know that a pump can be run with salt water, if you are careful?

A. Sure they can; if you are careful, yes.

Q. Did you look over the whole equipment to see whether she had any packing for her pumps?

A. No, sir.

Q. You don't know anything about that?

A. No, I don't know anything about that.

Q. You had no other criticism to make of the Edith Olcott, except the salt around the pump?

A. The salt in the boiler.

Q. That is all?

A. That is all.

Q. The vessel was all right except for that?

A. I couldn't tell you that it was all right, no.

Q. Well, you didn't see anything wrong?

A. No, I didn't see anything wrong.

Redirect examination by Mr. Englar:

Q. When you went on board did you examine the pumps?

A. No, sir, I didn't examine the pumps.

155 Q. The only thing you examined was the boiler?

A. The boiler.

Q. Explain to us why you considered it dangerous to go to sea with that boiler. Mr. Goodrich has suggested that you could easily have cleaned that out, so why did you consider it dangerous?

A. Well, if you use salt water in a boiler it accumulates very fast until it gets so much in the boiler that you can't do anything with it no more at all. How are you going to get it out?

Q. Mr. Goodrich has suggested that you could clean it out in 20 minutes.

A. When you have got the tugboat alongside, and you have got all the time in the world to wash them out.

Q. Is it an easy matter to wash a boiler?

A. No; you have to let the steam go down to about 10 or 15 pounds and then blow it off and then wait until the boiler cools off and open your hand holes and wash it out, and you have to wait till the boiler gets pretty cool to wash them in cold water; if you get hot water you won't have to wait so long.

Q. What do you use a tugboat for, you said you had to have one alongside?

A. To get force from the hose; you have to have force to wash it out.

Q. All you know about the condition of the pumps and the engine room supplies, etc., was what Green told you?

A. That is all.

Q. You got your information about that from him?

A. Yes.

Q. You personally only examined the boiler?

A. I only examined the boiler and I saw that the pump used only salt water; that was the thing I noticed.

156 Q. And having that pump for both fresh and salt water, if you have the boiler clean would it or not be likely to get salt in it again?

A. You are bound to get the boiler brackish and brackish water in the boiler; you can't get out of that.

Q. This Hyde pump that you speak of, is that a good pump?

A. Yes; all the big vessels have Hyde pumps; most of them.

Q. Do you consider that a serviceable pump for use on a vessel?

A. Yes.

Q. That is the kind of pump you had on the Grant?

A. Yes, that is the kind of pump we had on the Grant. We had

on the Grant one Hyde and one Worthington. We had a pump like the Olcott had, and when we got nearly water-logged in that Thanks-giving gale we took it out and put a Worthington pump in in the engine room instead of that old pump.

Q. I understand from your testimony that you were in the Grant for about 20 months?

A. Yes, for about 20 months.

Q. And you were in the Sherman for about 28 months?

A. For about 28 months.

Q. Mr. Goodrich said something about the pump in the Grant being in the between decks; did that make any difference?

A. Yes, it made a difference in the lift of the suction, you know.

Q. That was the Hyde pump in the between decks?

A. That was the Hyde pump in the between decks, but then we put the Worthington pump in the engine room and she was just as good as the one in the between decks.

Q. Do you remember the height of the poop deck on the Olcott?

A. Well, I didn't exactly notice it; but I should think it was about the height of my eyes; five feet.

Q. Do you remember if you stood on the main deck about how high the poop deck was?

A. Yes; about the height of my eyes; somewhere around that.

157 Q. How high will an ordinary hand pump raise water?

A. Well, if she is in good condition it ought to raise to 22 and 23 feet.

Q. That is as a practical matter?

A. Yes, sir.

Q. It will do that, will it?

A. Oh, yes.

Q. Theoretically it ought to raise it higher than that?

A. Theoretically it ought to raise it about 34 feet.

Q. But practically it will raise it 22 or 23?

A. The best you can get out of a pump is between 20 and 25 feet.

Q. Of course when the water gets higher in a vessel the less distance you have to lift it?

A. Yes; the more water increases below the less you have to lift it.

Recross-examination by Mr. Goodrich:

Q. Suppose you were told that the steam engine on the Edith Olcott worked all right for three days, or two and a half days; would you withdraw your criticism about the salt on the outside?

A. No, I would not withdraw my criticism; no.

Q. But you would think, wouldn't you, that if a steam engine worked all right for a period of over two days that your fears about going in the Olcott were groundless?

A. No, I wouldn't take those chances, because I saw what was necessary.

Q. You don't know anything about what the boiler and engine did on the Olcott, do you?

A. No.

Q. Did you talk with the shipwrecked gang after they got back?

A. No, I didn't see any of them only the mate and captain.

Q. Did you ever ship on a sailing vessel that had boilers
158 with the appearance of salt around them?

A. Oh, yes, I have shipped in them; yes.

Q. Any disaster ever happen to you?

A. No.

Q. It is not an unusual thing, is it, to have the appearance of salt around the boiler?

A. No, it is not an unusual thing, but it isn't the right thing to do, either.

Q. How often do you wash a boiler out? What is your practice, as an engineer?

A. Well, I think three times a year.

Q. Every four months?

A. About every four months.

Q. After the Grant had been fitted out with the pump that you speak of, she had the same pumps, did she not—not the same make, but the same number and character of pumps as the Olcott had?

A. After she was fitted out? No.

Q. She had more?

A. She had two duplex pumps; two direct-acting duplex pumps.

Q. But she had the same capacity of pumping as the Olcott?

A. Yes.

Q. And before that she hadn't?

A. Before that she hadn't.

Q. What sort of pumps did the Maud Palmer have?

A. She had a Hyde pump, a wrecking pump; that is all.

Q. That is all she had except her hand pumps?

A. No; except her circulating pump for the condenser you know.

Q. That doesn't pump the vessel out?

A. That doesn't pump the vessel out.

Q. Then the Maud Palmer had only one pump and her hand pumps?

A. Yes.

Q. Then the Olcott had two more than that, didn't she?

A. Yes, she had two more.

Q. Where were the Maud Palmer's hand pumps located?

159 A. On the deck; she was a flush deck boat right through.

Q. In what part of the vessel were they?

A. I think they were in the forward part of the cabin, right close to the spanker mast.

Q. Are you not sure about it?

A. Well, I wouldn't be sure but I am pretty sure about it; right alongside the spanker mast.

Q. What did they do about working the hand pumps on the Palmer; how often did they work them?

A. We tried them once in a while; that is all.

Q. You tried them every day?

A. No; she had only—oh, she had two suction; when she went

down by the storm too much we tried the hand pumps and otherwise we used the steam pumps.

Q. How often would you try the steam pump?

A. Once we kept it going every two hours.

Q. But what was your general custom?

A. Well, that is hard to tell.

Q. How old was the Maud Palmer?

A. Well, I have understood she was 10 years old.

Q. Are you sure about that?

A. Well, that is what I heard; I never looked in the Blue Book.

Q. Where did the salt come from that you saw?

A. It came out of the boiler.

Q. How did it get into the boiler?

A. Through the feed pump.

Q. How did it get into the feed pump?

A. Well, there is only one pump used for washing decks and to prime the wrecking pump then you have to go to work and use the same pump to pump the fresh water into the feed tank.

Q. That is the way it gets into the boiler, is from the feed pump, after the feed pump has pumped salt water?

A. Yes.

160 Q. If you dipped a tin bucket in salt water and then threw away the salt water and dipped it in fresh water and took a drink out of it would you have any salt taste?

A. No; that ain't got anything to do with the pumps.

Q. Why not?

A. If you want to get that pump fresh you have to pump more than 50 gallons of fresh water through it before you would get it fresh.

Q. Where would the salt water remain which would require 50 gallons of fresh water to clear it?

A. In the suction chamber, and in her delivery chamber and in her pipes.

Q. Do you think that the water in those three places doesn't move constantly?

A. Yes.

Q. Is there any pump where salt water is packed?

A. There may be salt water in the pipe pump.

Q. Suppose you disconnect your pipe?

A. Do you want me to draw a diagram?

Q. No.

A. Oh, yes, I have seen them disconnect a pipe every time they draw water.

Q. It isn't the custom to do it?

A. It isn't the custom to do it; sometimes you haven't got no chance to disconnect it.

Q. Do you wash down the decks at sea?

A. Yes.

Q. Do you mean at sea?

A. At sea, yes.

Q. How long before the Olcott sailed was it that you went on board of her?

A. Well, I couldn't tell you exactly; I think it was two days, but I ain't quite sure.

By Mr. Englar:

Q. Mr. Goodrich has asked you whether you had any disaster by reason of salt in the boiler, and you said no; have you ever had any trouble with salt in boilers?

161 A. Not exactly, but with dirty boilers; in that there schooner we had to put back again into Pensacola just on account of the boiler.

Q. Is there any loss of power by reason of using the winches to work these power pumps as compared with the duplex pumps?

A. Why, yes; all the power it takes to run the winch is wasted.

Q. How does the duplex pump compare with a power pump as to capacity for putting out water?

A. Well, that pump in the Olcott, there was two pumps in the after part of the house and in the engine room the same way, and one duplex pump would throw as much water as the four pumps because they run double and single action.

Q. Which is the single action?

A. Well, the pump draws the water——

Q. Which pumps do you say are single action?

A. The Olcott's.

Q. And the duplex pumps are double action?

A. They are double action.

By Mr. Goodrich:

Q. Wasn't there a duplex pump on the Olcott?

A. Not to pump the vessel out.

Q. Don't you call that pump that was run by the messenger chain a duplex pump?

A. No, sir.

Q. What was the big pump in the power house, duplex or centrifugal?

A. It wasn't a duplex pump; it was a single action pump.

By Mr. Englar:

Q. When you refer to a duplex pump do you mean a pump where you run the steam direct from the boiler to the pump?

A. Exactly; it is like the Hyde pump and the Worthington pump.

162 Q. That is where you run the steam direct to the pump?

A. Yes, direct to the pump.

Q. Pumps such as are on the Olcott do you call power pumps?

A. You call them power pumps, because you can move them with wind or tide or water power, or anything, and with a duplex pump you have to have steam power.

Q. Would you have to have more steam to run a pump like the Olcott's than to run a duplex pump?

A. Yes, sir, and the Hyde pump works with 40 or 45 pounds of steam; you can keep it going all day long.

Q. Did you consider from the inspection of this boiler that you made that you could keep the Olcott's pumps going constantly in an emergency with that boiler?

A. Well, that is hard to judge; you couldn't keep the two of them going at one time. In the Grant we had one of those power pumps like the Olcott and the Hyde pump, and I couldn't keep them both running at one time, because they were too small; the Grant had a 40-inch boiler and I suppose the Olcott must have been 36 or 38; I couldn't tell the exact measurement.

By Mr. Goodrich:

Q. What make were the pumps on the Olcott?

A. I couldn't tell you.

Q. What make was the boiler?

A. I didn't notice that; there is very seldom a label stuck on where you can see it.

Q. Do you know the size or the make of any of the pumps on the Olcott?

A. No.

163

Deposition of John Gustaf Green.

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON & ANO., Respondents.

Deposition of John Gustaf Green, Taken on Behalf of Plaintiff Before a Notary Public, at the Office of Messrs. Harrington, Big- ham & Englar, No. 64 Wall Street, New York, October 31, 1912.

Appearances as before.

Same stipulation as before.

JOHN GUSTAF GREEN, being duly sworn and examined as a wit- ness for the libellant, testifies:

By Mr. Englar:

Q. Mr. Green, what is your business?

A. My business?

Q. What is your work?

A. My work is as engineer.

Q. On what kind of vessels?

A. I have been on schooners as engineer. I couldn't say how many years I have been, but from 10 to 12 years, any how.

Q. How long have you been going to sea altogether?

A. About 30 years.

Q. How old are you now?

A. Forty-four, sir.

Q. In the summer of 1910 were you on board the schooner Edith Olcott?

A. Yes.

164 Q. Do you remember what month it was?

A. No, sir, I couldn't say if it was the latter part of July or 1st of August; I couldn't say; I don't remember the date.

Q. It was one or the other?

A. Yes.

Q. In what capacity did you go on board the Edith Olcott?

A. I came in the capacity as engineer; I signed as engineer.

Q. What did you do when you went on board the Edith Olcott?

A. When I came on board the Edith Olcott I looked over things—what I always do when I come in a vessel. The first thing I noticed when I started in was the inspirator. I couldn't feed the boiler. So I went to the captain and told him about this, and he told me to go up to the store to get the valve what I wanted.

Q. The valve that you wanted?

A. What I wanted for the inspirator, to get it fixed.

Q. What else did you do?

A. I got that. I don't remember—there was some little things more besides that; and I went on board and did that repairing.

Q. You fixed the inspirator?

A. Yes, I fixed the inspirator, and filled the boiler, and it was O. K.

Q. Then what did you do?

A. Then I started first with the deck pump. I can't remember what time we started first. That was the next day when I got it fixed; I didn't get the valve fixed up before the next day; the first day I didn't get it fixed up.

Q. What is that you didn't get fixed the first day?

A. The first day I didn't get the inspirator fixed up. The second day I fixed it and I got through with that job.

Q. The second day you got the boiler filled?

A. Yes, the second day I got the boiler filled.

165 Q. Then what did you do on the second day?

A. There were a number of things; I can't remember what I was doing. There was a lot of different things to do. And on the second day, some time in the day in the afternoon, I think to myself, "I have got everything so and so, and I will go to see the pumps." They were looking to me, they was in a bad shape. Then, sir, I used the little pump. I was washing down the deck with it. Then some time—I can't remember what time it was in the afternoon—I tried the two pumps for the bilges; and I primed them with water. I pulled some water up, and I tried one first; then I tried the other one. So I think to myself, "There is some trouble there."

Q. Just a moment. When you tried them what was the result?

A. Well, what I think it was—

Q. Just a moment. Just tell us what happened first.

A. Well, what happened? It happened that I couldn't get any suction through it, because there was some trouble with the packing—if I will call it that, and I will call it a collar, being the old style pumps. It isn't like wrecking pumps, though. I think—there was some trouble with that, I know, but I don't know what it was.

Q. Could you get them to catch?

A. No, I couldn't get them to catch; I gave it up.

Q. Even after you had primed them?

A. Yes. I primed them; I primed one—I tried one first; and then I tried the other one. I wasn't at it very long, but I was at it long enough if it was in order after I fixed her.

Q. Was there any water in the vessel sufficient for them to catch?

A. Yes. I don't remember what water was in the vessel. I sounded the vessel. I know some vessels, they suck to 14 inches, and another one might suck to 12, 13 inches. There was
166 more water, I know, for I was sounding, and I think to myself, "I am going to see how the pumps work."

Q. You sounded to see how much water there was in the vessel?

A. Yes, sir. When I first come on board a vessel, especially when she has got a cargo like that, I sound any how a couple of times a day in any vessel I go in; and sometimes, if I think the vessel is leaking badly, or anything like that, I sound oftener.

Q. Do you remember that there was water enough in her for the pumps to have caught if they had been working?

A. What I say. I think the vessels I have been in—and I have been in a good many and different sizes—and I don't know a vessel I may not say on 13 inches; they always pump to 12, 11, and also to 14 inches some gets on. But there was more water, I know, but I think I am sure that there was more water, but I can't remember how many inches of water it was; That vessel might suck at 13 inches, like some do; I couldn't say.

Q. Do you know that there was as much as 13 inches in it?

A. There must be 13 inches or I could not have primed the pumps. I would not have primed the pumps if there was not water enough in the vessel. I am old enough for that. I work at that; I sometimes do that; I mean I see how they work.

Q. What did you do after you tried the pumps?

A. Well, I went to work with other things; I went to work with one thing and another. And then I said to myself, "I better see the captain about this." No, I can't remember this, it is so long ago. I remember, as I say now, after I had been working there in the engine room, there came a gentleman to the door, and he said—
167 this was after I had tried the pumps—a gentleman came to the door; and I thought he knowed me because he said my name, "John." He said, "You ought to keep on working"—something like that; "you had ought to keep on working like that," he said. So I told him there was a lot of things to do. I said, "I have got so and so fixed." So I asked, "Are you Mr. Pendleton?" I say. So this gentleman told me he was one of them. So I say, "I shall need more stuff," I say, "if I can go up to the store and get it," I say. Well, this gentleman told me to go and see the captain. So I went to see the captain about it right after that gentleman had spoken to me—right after that I went to the captain and met him on deck. So when I told him that I wanted some packing and little tools—what it was I can't remember, but there was a few different things I wanted; might come up to perhaps ten or twelve dollars, I

couldn't say the price of it (but when finished it come to be paid any how), and the captain didn't seem to like it; he didn't give me no satisfaction yes or no; but he said something, but I didn't get no satisfaction about it.

Q. Can you tell whether the man who said he was the one Mr. Pendleton was the Mr. Pendleton who is in the room now?

A. No, no, it was not that gentleman.

Q. It was not this gentleman (indicating)?

A. No. This gentleman I didn't know until I come to ask if it was Mr. Pendleton, because he seemed to know my name. He said "John." I thought he had seen the Articles. I thought he had seen the Articles. So I thought he was Mr. Pendleton; so I think, "I had better ask him to get some stuff—some packing and"—

Mr. Goodrich: Note on the record that the gentleman present, to whom reference has been made, is Mr. Fields S. Pendleton.

168 Q. You say that you could not get any satisfaction out of the captain?

A. No, sir; he went away from me.

Q. Did he tell you that you could buy this packing?

A. No, he didn't at all; he didn't allow me to ask him; so he went away from me, and I went forward again.

Q. What did you need for these pumps?

A. Sir?

Q. What was it you needed for these pumps for the difficulty you remarked?

A. I couldn't tell, because I didn't take them apart. If I had nothing to do with, it was no use to go to work and take them apart—if I had nothing to fix them with. If I had anything to fix them with I would find out what the trouble was.

Q. Did you have a good set of tools to take them apart with?

A. No, I didn't see any tools in the engine room—well, there was a couple of—a few pieces; I couldn't say there was nothing. Well, I fixed up the inspirator, and that I did with some old tools.

Q. Was there any packing around there for these pumps?

A. No, I didn't see anything like that. If there had been anything I would not ask for that.

Q. You asked for packing, did you?

A. I asked for packing; and I can't remember some different things I asked for; I can't remember now what it was; but different things I was asking for.

Q. In your opinion what was the trouble with these pumps when they would not catch?

A. They are hard to tell. If the suction is all right in a vessel and the pump won't catch water, then there must be something the matter with the pump. If the pump is in good order, 169 then there must be some trouble with the suction. I don't know what could be the trouble, because I didn't take them apart. I didn't take none of them apart.

Q. Can you say it was either something wrong with the suction or something wrong with the other parts of the pump?

A. No, I couldn't say what was wrong with them. But I know there was some trouble when I couldn't catch water, that is all.

Q. You know it was either the suction or some other part of the pump that was out of order?

A. Yes. It was something. It must be something.

Q. Were you willing to go to sea in the boat?

A. Yes, sir. I mean to say I was willing—I was glad—when I got the job; that is what I mean, yes.

Q. Why were you glad when you got the job?

A. I had been long time ashore, and there was nothing to do, nothing going on, no shipping. So when Mr. Hall came and gave me the job—

Q. Did you go to sea in her?

A. No, I didn't go to sea in her. At that time I didn't get no answer from the captain, when he went away, I went up and changed my mind; I said to myself, "I can't go; I can't go in that vessel, then, if I don't get anything to do with."

Q. Why didn't you go in this vessel?

A. When I couldn't get the stuff, and when I went to find out what was the trouble with the pumps, I would not go in it, because that was not fit to go. So I went up to the house where I used to live—I had been quite a stranger ashore—so I went up and asked the boss of the house who I was living with—Caliski the other mans

called him, he was standing in the bar when I came in—I
170 asked him if he would be kind enough to let me stay some days or few days more, which I couldn't say that was for a few days more, to get a job; for I say, "I am sure," I say—

Q. Don't tell what you said. Just tell what you did.

A. I didn't mean that.

Q. You decided not to go on this vessel? Is that correct?

A. Yes. That is what I mean, yes.

Q. That was the second day you were on board?

A. No. That was the third day.

Q. The third day?

A. Yes, that was the third day. When I put my mind up, when I went up in the place and asked if I could come back, that was the third day.

Q. That is, when you went up to the boarding house and asked if you could come back?

A. Yes, sir, that was the third day; the last day I was on board.

Q. That was the last day you were on board, was it?

A. Yes.

Q. Did anybody else come around and look at the vessel or look at the engine while you were on board?

A. When that gentleman told me that I could stay I went to the shipping master that was shipping me and I told him to get a man in my place. I was sick, I told him; I didn't feel well.

Q. Were you sick?

A. No, I was not sick, but I said so. I knew very well if I said to Mr. Hall I didn't like the vessel—

Q. Did you go back to the vessel then?

A. Then I go back to the vessel—then after I seen Mr. Hall I go back to the vessel.

Q. What did you do there?

A. I went to tell the captain that I would not go with him. I told him that. I couldn't say that I said it right then—I suppose I said it right then—that I was sick.

Q. What did the captain say, or what did you say?

A. I said to the captain, "I have been up to the shipping master and told him to look out for a man in my place."

Q. What did the captain say?

A. The captain, he said—the captain got mad; he asked me if I didn't know that before.

Q. Didn't know what?

A. That I was sick.

Q. All right. What did you say?

A. I said, "No, sir," I said.

Q. Did you stay on the vessel any longer?

A. Yes, sir, I stayed longer on the vessel.

Q. Why did you stay longer?

A. The captain wanted me to stay till he got a man in my place.

Q. After that did anybody else come on board?

A. The shipping master came afterwards with an engineer—some time afterwards.

Q. Do you remember who it was?

A. I didn't know that gentleman, no; it was an engineer, any how, that was there, and he was going to take my job. He came to the engine room.

Q. Do you remember whether there was a man named Linder came on board when you were there?

Mr. Goodrich: I object. The witness has already answered.

Mr. Englar: He said some man came aboard.

Witness: He was another engineer.

Q. Did Linder come aboard—a man named Linder?

A. Yes. He promised to come—that gentleman he was speaking about—that engineer.

Q. The man you didn't know?

A. Yes.

172 Q. How about Linder?

A. The shipping master went for another engineer, and that was Linder.

Mr. Goodrich: I object to his line of testimony, and move to strike out the answers.

Q. Did you have any conversation with Linder while he was on board?

A. Well, we had a conversation. We had to look over—we looked over the gear and things that were there. We were looking over it with the pumps and things like that, and had a conversation together.

Q. Did the captain who was on the vessel when you went down there go to sea in her?

A. No.

Q. Did you see him after the vessel went to sea?

A. Yes, sir.

Q. Well, I saw him when the vessel was not on the pier—just swinging in the river like.

Q. That is, after she had put out in the river?

A. Yes, sir, when she was cleared of the wharf and swinging around I came down the wharf.

Q. Did you see any members of the crew after they got back after the Olcott was lost?

A. Yes, sir.

Q. Which one did you see and talk to?

A. I see the cook first; I see him right away when he came from the steamer when they were picked off.

Q. Who? The cook?

A. Yes, sir.

Q. Did he make any statement to you?

A. Yes, sir.

Mr. Goodrich: Don't you tell what he said.

Mr. Englar: I want him to tell.

Mr. Goodrich: I object to the witness telling what the cook says.

173 Q. Tell what your conversation with the cook was.

Mr. Goodrich: Objected to upon the ground that the cook has not been called; upon the further ground that conversations between the cook and this witness are not competent evidence; upon the further ground that this witness cannot be examined in this way, as it is a general conversation, until specific statements of the cook are presented to the witness and he is asked concerning any contrary statements made by the cook.

Mr. Englar: This testimony is being taken de bene esse, on the ground that the witness is leaving the country and that the witness is going to sea; and I am taking this evidence of conversations merely because it may later be competent if the cook is called.

A. Well, I asked how it happened that they came back. He told me that they couldn't get the pumps to work; and he said that he was going to get his money, and he was going to tell Mr. Pendleton something about it when he got his money, he said.

Q. What else did he tell you, if anything?

A. So he told me if they had only could get one of the hand pumps to work, he believed that they could have kept the vessel afloat.

Q. That would have kept the vessel afloat?

A. Yes, sir.

Q. Did you have any talk with any other member of the crew?

A. Yes, sir. I don't remember if it was that day or the next

day we were standing, a few fellers, in the street, talking, and we were talking about this vessel that the cook came back; and
174 then came the chief—I didn't know he was chief, and he said he was chief.

Q. The engineer, you mean?

A. Yes. We called him chief. The engineer, yes.

Q. What did he say, if anything?

Mr. Goodrich: Same objection.

A. He told me the pumps was in bad shape, he couldn't get them to work, they wouldn't turn any water, he said; and, if I remember right, he said that he took one of the suction pumps up for one of the hand pumps, I think he said, and it was all full of holes. And as soon as there is any hole in a suction pipe of any size it can't catch the water without you patch that hole up—without that hole is fixed. You can't catch the water when there is a hole in the suction—a broken hole or anything like that—a rough hole or anything like that.

Q. What vessel are you on now?

A. I am on the Josephine.

Q. Are you going to sea soon?

A. Well, I don't know if we will be ready to-morrow afternoon.

Q. Are you going to sea pretty soon—within the next few days?

A. Yes, sir. If we be ready to-morrow afternoon, I heard the captain would order a tow brought for the schooner to come; the captain wanted him to go about three o'clock to-morrow if we were ready to go out. We go to Philadelphia.

Q. Do you know where you are going from there?

A. I didn't ask the captain; the captain had just come on board a couple of hours before I left her.

Cross-examination by Mr. Goodrich:

Q. Have you signed on the Josephine?

A. No.

175 Q. Did you sign on the Edith Olcott?

A. I signed before the shipping master. Excuse me, I may not say. I signed with Hall—Mr. Hall.

Q. Did you sign the Articles?

A. Yes, sir.

Q. Of the Edith Olcott?

A. Yes, sir.

Q. And agreed to go in her?

A. Yes.

Q. Have you signed and agreed to go in the Josephine?

A. No, I have not signed yet.

Q. Are you a member of any of the Sailors' Unions—Seamen's Unions.

A. If I remember any, you say?

Q. Are you a member of?

A. Yes, to-day I am.

Q. Of what Union are you a member?

A. Of the Atlantic Coast Seamen's Union.

Q. Are you a member of any other?

A. No.

Q. Have you ever been a member of any other?

A. No, sir; no, sir.

Q. Never?

A. No.

Q. Quite sure of that, are you?

A. Sir?

Q. Are you quite sure of that?

A. Well, I don't call that that I belonged to the Union that I got a pass-card to go to; I can't go to it; and that card I had so long a time that I didn't call it a union.

Q. How long were you on board the Edith Olcott altogether?

A. I can't remember. One afternoon, and I was the next day and the third day.

Q. You are sure that you were on board parts of three days?

A. Yes.

Q. Were you on board parts of four days?

A. No.

Q. Sure?

A. No.

Q. But you were there parts of three days?

A. Yes, sir.

176 Q. You are positive of that?

A. Yes; that is what I think—that I was three days. Yes.

Q. How long did it take you to fix up the inspirator?

A. Well, sir, I don't remember; but I didn't get it fixed the first day; it was the second day I got the inspirator fixed.

Q. How long did it take you? How many hours?

A. Well, I couldn't remember. I had to go up to the store first. They didn't have—there was something they didn't have there in that store. I don't remember—I think it was the valve they didn't have; I think it was.

Q. The captain told you to go and get something at the store?

A. No. I was up in the store; I was up in the store, when they sent me to another store—some gentleman sent me to go to another store.

Q. Did the captain tell you to get what you wanted at the store?

A. Yes, sir.

Q. Whose store was it?

A. What I heard, it was Mr. Pendleton's store.

Q. And he told you to go there and get what you wanted, did he?

A. Yes.

Q. And you went there and got it?

A. Not in Mr. Pendleton's store all, because I had to go to another place.

Q. You had to go to another place to get a valve?

A. Yes.

Q. And you got it?

A. Yes, sir.

Q. And it was sent down or brought down to the ship?

A. No; I brought it down myself.

Q. When you went up to the store did you ask for packing?

A. I had been so short a time on board, I—

Q. Did you ask for packing? Yes or no?

A. No, sir.

177 Q. Did you look in the lazaret for packing?

A. No, sir.

Q. You didn't look anywhere for packing, did you, except around the engine room?

A. In the engine room.

Q. That is all?

A. Yes, sir, that is all.

Q. Did you ask the captain where you could find packing?

A. No, I didn't.

Q. Did you ask anybody where you would find packing?

A. Well, I might have talked to—

Q. Did you ask anybody where you would find packing?

A. No, sir, I couldn't say; no, sir, I don't think I did.

Q. You did not?

A. No, sir, I don't think I did.

Q. You used the little pump to wash the deck?

A. Yes.

Q. What little pump do you mean?

A. What we call the deck pump.

Q. Where is that? In the engine room?

A. When we wash the deck, and when you want to feed the feed tank, when you want to run it at low pressure, you use that pump.

Q. You had no trouble in using it?

A. I couldn't say if there was.

Q. It worked all right, didn't it?

A. I am not sure if I did something to it it worked all right when I was there when we were washing it.

Q. It worked all right?

A. Yes, it worked all right then.

Q. You say that you tried the bilge pumps?

A. Yes, sir.

Q. Where were they?

A. One was inside the engine room and the other one right outside against the house like.

Q. Which one did you use?

A. I tried the both of them.

178 Q. Tried both of them?

A. Yes.

Q. Both sets of them?

A. Yes. Two big pumps, I mean to say.

Q. Where were the pumps?

A. One was—excuse me, one was inside, I said, and one standing—one running with a messenger, I can't remember; and the other one, we put a clutch to it—what we call it.

Q. A clutch?

A. Yes.

Q. And the clutched one was inside the house?

A. Yes, sir.

Q. Was it a single pump or a double pump?

A. Double pump.

Q. And the one outside of the house, was that double?

A. Double action.

Q. Two double pumps, one inside and one outside?

A. Yes.

Q. Did you think one was out of order?

A. No; both was the same.

Q. Both out of order, you think?

A. Yes.

Q. Did you ever take them apart to see if they were out of order?

A. No.

Q. What made you think they were out of order?

A. When they would not catch water, then there must be some trouble with the pump somewhere.

Q. If there was no water in the vessel, then would there be any trouble?

A. Yes—then I couldn't expect to go to work.

Q. Was there any difference from there being no water in the vessel? In other words, if there had been no water in the vessel would it have been any different?

A. Yes, it would have been different. I mean to say that there would have been that difference that I couldn't expect to get any water from the vessel.

179 Q. Of course not. The pump would not suck if there was not anything for it to suck?

A. No. That is what I mean.

Q. Then you don't know that there was anything the matter with the pumps at all—

A. Yes.

Q. Except that they did not bring up any water?

A. They didn't bring up any water.

Q. That was the only thing that was the matter with it so far as you could see?

A. So far as I could see, yes; so far as I could see. I didn't have them apart.

Q. Do you say that you sounded the vessel when you went on her first?

A. I sounded her. I couldn't say—

Q. Wait a minute. Did you sound her when you went on her?

A. No, not the first day; I didn't sound her, I don't think, the first day.

Q. Did you sound her the second day?

A. Yes.

Q. What time of day?

A. It was some time in the morning; I couldn't say.

Q. Where did you sound?

A. Well, I can't remember.

Q. Did you sound at all?

A. Indeed, I sounded at all; yes, I sounded at all. I am sure I sounded every vessel with cargo.

Q. Never mind about other vessels. Did you sound on this vessel?

A. Yes, I said.

Q. Where did you sound?

A. I can't remember where it was; I can't remember the sounding place; and my mate was on board, and I guess I asked——

Q. You didn't sound yourself, but he did? Is that it?

A. No. I sounded myself.

Q. But you don't remember where?

A. No.

Q. What did you sound with?

A. Sounding rod and line—sounding rod and line.

180 Q. You are sure of that, are you?

A. Yes.

Q. You remember that?

A. Yes.

Q. It was out on deck, was it not?

A. No, sir, I can't say yes or no to that what it was—if it was.

Q. How much water did you find in her?

A. I couldn't say; I don't remember how much it was.

Q. Didn't you say there was about 13 inches in her?

A. No.

Q. I thought you did.

A. No.

Q. How much water was there in her?

A. I couldn't remember; I can't remember.

Q. Was there 10 inches in her?

A. Oh, then, I would not have tried to pump water if there was not more water than that.

Q. How much water would you have to have in her for those pumps to suck?

A. At least you expect about 16 inches.

Q. And you think there was 16 inches?

A. Yes, there was 16 inches. If there hadn't been 16 inches I would not try to prime the pump.

Q. In other words, there was enough water in her for the pumps to catch if the pumps had been in order?

A. Yes, sir, that is what I mean. That is my opinion.

Q. You had a talk with the captain, which resulted in your going up to Mr. Pendleton's store and getting some things, including a valve?

A. Yes.

Q. Did you go to the captain a second time, do you say, about some things?

A. There were——

Q. Did you go a second time about some things?

A. Yes.

Q. What did you ask him for?

A. I can't remember what it was. I can't remember what he said.

181 Q. What did he say?

A. He didn't say nothing, either yes or no. He went away from me. He said something, and it was not yes or no, I know that, and I can't remember what it was he said.

Q. You had some talk with the captain about your being sick?

A. Sir?

Q. Did you have some talk with the captain about being sick?

A. I told him at that time, yes, after I told the shipping master.

Q. Did you have some talk with him about being sick? Yes or no?

A. Yes, I told the captain I was sick.

Q. Did you tell him what was the matter with you?

A. I told him what sickness I said it was.

Q. What sickness did you tell him?

A. I told him that I had venereal——

Q. Venereal disease?

A. Venereal disease.

Q. And what did he say?

A. He asked me if I didn't know it before; something like that.

Q. Didn't he tell you to get out, he would not have a man with your disease on board?

A. No, sir.

Q. He did not?

A. No.

Q. Sure of that?

A. I have asked the captain myself for to leave. I told the captain.

Q. Didn't the captain say to you that he would not have on board a man with the sickness that you had? You swear to that, do you?

A. I can never remember that he said a word about that, because I asked the captain myself to be clear of the vessel. I asked the captain myself to be clear of the vessel.

Q. Did you ever see before this gentleman who is with me, Mr. Fields Pendleton (indicating)?

A. This gentleman here (indicating)?

182 Q. Yes?

A. Yes.

Q. Where did you see him?

A. Well, I saw this gentleman down in Mississippi some years ago.

Q. Down in Mississippi?

A. Yes.

Q. How long ago was that?

A. I don't remember.

Q. Was it within the last three years?

A. It was longer than that.

Q. Longer than that. Have you seen him since then?

A. Yes.

Q. Where?

A. I think I saw Mr. Pendleton and the captain that didn't went—what signed me, engaged——

Q. Captain Fletcher?

A. I have forgot his name.

Q. Where did you see him?

A. Down on the wharf, when the schooner swings into the bay—into the river, I mean to say.

Q. You mean when the Edith Olcott was getting ready to go to sea?

A. No. She was outside already.

Q. When did you see Mr. Pendleton the next time?

A. Up in the office.

Q. When was that?

A. I can't remember the date.

Q. What vessel were you on before the Edith Olcott?

A. In the Edith.

Q. How long had you been ashore after you left the Edith?

A. Well, sir, I left her in Philadelphia, and I was some days ashore seeing friends, and then I was quite a spell ashore, and then I was in New York; I went from Philadelphia to New York, I remember.

Q. Were you in a hospital?

A. No. I have never been in a hospital for sickness.

183 Q. Never?

A. Never.

Q. Did you get a hospital receipt?

A. Oh, yes. I have had hospital receipts different times, yes; but I mean to say not from that vessel.

Q. Where did you get your hospital receipt?

A. Oh, I can't remember. It was last winter I had a hospital receipt then to go to a doctor. I got an accident.

Q. Never mind about that. I don't care about last winter. But did you have a hospital receipt before you went on the Edith Olcott?

A. It might be a year before or two years; I don't remember. Sometime the captain—

Q. Did you ever use it?

A. Some years ago I used one. I was sick like in Jacksonville and went to see a doctor—what you call a marine doctor.

Q. Marine doctor?

A. Yes.

Q. What did you go to see him about?

A. What they call rheumatiz, or neuralgia, or something like that.

Q. Mr. Englar, who has been examining you, has had before him a paper. Did you see him have it while he was talking with you? Did you see Mr. Englar here have a paper before him while he was talking with you?

A. Yes, sir.

Q. Did you give a statement in this case?

A. Yes.

Q. To Mr. Englar?

A. Yes.

Q. When did you make that statement?

A. I can't remember the date.

Q. Did you make the statement to Mr. Englar?

A. I can't remember that neither—whether it was Mr. Englar.

Q. Was it recently?

A. Sir?

Q. Was it recently—a little while ago—that you made the statement?

A. No.

184 Q. Within three or four days?

A. No.

Q. Long ago?

A. Long ago. Let me see——

Q. Did you make that statement here in this office?

A. So far as I can recollect, I was in this office; I am not sure of that.

Q. Did you sign the statement?

A. I am not sure of that neither.

Mr. Goodrich: I ask Mr. Englar to show to the witness the paper he has had in his hand.

Mr. Englar: This (indicating) is a copy of the statement that Mr. Green gave me. I have in my possession a signed original sworn to by Mr. Green.

Mr. Goodrich: Will you kindly show the witness the paper?

Mr. Englar: You want the original or the copy?

Mr. Goodrich: The original.

Mr. Englar: I will go and get it. I have it here.

(Mr. Englar gets a paper and hands same to witness.)

Q. Mr. Englar shows you a paper. Is that your signature?

A. Yes.

Q. Did you swear to that? Is there a notary's name on it by your signature there?

(Witness looks at the paper.)

A. Yes, I swore to that statement.

Q. Where did you swear to it? When? Look at the date and see.

A. (Witness looks at paper.) 20th day of October, 1910.

Q. What is the name of the notary public?

Mr. Englar: William J. Bannon.

Q. In what county is the venue of that affidavit laid?

185 Mr. Englar: He doesn't know. It is the County of New York.

Q. Where were you when you swore to that?

A. I can't remember—whether it was up town or anything like that, in those big buildings.

Q. Who asked you to sign that?

A. I can't remember.

Q. Do you know a man by the name of Peterson?

A. Oh, that gentleman! But I think I can't remember. Yes.

Q. You know a man by the name of Peterson. What did he have to do with the case?

A. Well, I don't know what he had to do with it.

Q. Had he anything to do with it?

A. Yes, he must.

Q. How?

A. That was that gentleman who came after me the first time on board the steamer. I left that time.

Q. What was her name?

A. The Frederick A. Davenport that I was in charge of.

Q. Where was she then?

A. In Newtown Creek.

Q. Cross, Austin & Ireland, weren't they?

A. Yes.

Q. The lumber yard?

A. Yes.

Q. Cross, Austin & Ireland's?

A. Yes.

Q. Did he tell you he was a delegate from the Sailors' Union?

A. No.

Q. How did you know he was?

A. No, I didn't know he was. I didn't know Mr. Peterson. I didn't know that at all.

Q. Was there anybody with Peterson?

A. Yes, sir.

Q. Who was he?

A. He was a delegate from the Sailors' Union.

186 Q. And Peterson was a detective, was he?

A. Afterwards I think he was, but I really didn't know.

Q. You didn't really know it at that time, but, after, you found it out? Is that so?

A. I don't know to-day. I didn't understand that business in that line what he wanted me to come up to some place with him.

Q. Did they come to you in an automobile?

A. Yes.

Q. And where did you make the statement?

A. Well, I think that it was his own apartment where we was that night.

Q. Peterson's?

A. I think, if I remember right, that his name was Peterson.

Q. How much did he pay you for it?

A. Well, I didn't get paid for going and making the statement, but I will call that that I got three dollars for going down there. I was going somewhere else that night, and he took me along in that automobile—took me along to that place.

Q. Did you ever make another statement?

A. Yes.

Q. Where? For Mr. Englar, I mean?

A. I think so; I am not sure.

Q. Is the statement that you have looked at, the one that is lying before you there, the one that you made for Mr. Peterson?

A. I don't know if I can call it that way. That it is a copy of it or something like that.

Q. Mr. Englar has showed you a paper with your signature on it?

A. Yes.

Q. Is that paper with your signature on it the one you signed for Peterson?

A. I can't remember if I signed that for Peterson up there over in Brooklyn. I was next day over here in New York.

187 Q. Did you come to Mr. Englar's office the next day?

A. I think that it was, sir.

Q. And who came with you?

A. That——

Q. — delegate from the Sailors' Union?

A. I can't remember, sir; I can't remember if he came down with it.

Q. Was it not the delegate from the Sailors' Union that brought you over here?

A. More likely that it was. I can't remember.

Q. And you made the statement over here?

A. Yes.

Q. And signed it over here. Is that the statement—the one that you made here?

A. This is the statement (indicating).

Q. The one that is before you is the one you made over here?

A. Yes, sir.

Mr. Goodrich: I ask to have the stenographer mark that paper for identification.

Mr. Englar: No objection.

Said paper marked Exhibit A for ident. Green Oct. 31, 1912.

Q. Did you ever make any other statement?

A. Yes.

Q. You made one for Mr. Pendleton, didn't you?

A. Yes.

Q. (Paper shown witness.) Does this paper that I show you bear your signature?

A. Yes.

Q. And you swore to it on the 13th day of January, 1912, before Joseph F. Moran, Notary Public, did you? You swore to that, didn't you?

A. Yes. But there is one thing I can't——

Q. In the presence of Mr. Hall? Mr. Hall was there too?

A. No.

Q. No?

A. No. Mr. Hall was not there at that time. Well, he might be, but I didn't see him. I mean to say that is a different thing.

188 Mr. Englar: May I see the statement?

Mr. Goodrich: No, sir you may not. Not at this time.— Will you kindly mark that statement (addressing stenographer)?

Mr. Englar: I beg pardon.

Mr. Goodrich: Not at this time.

Said paper marked Exhibit B for Ident., Green, Oct. 31, 1912.

Mr. Englar: I think I have a right to see that, now it is marked.

Mr. Goodrich: No answer.

Mr. Englar: Do you still refuse to let me see it?

Mr. Goodrich: We are on the record, Mr. Englar?

Q. How much was paid you when you came to Mr. Englar's office and gave the statement here?

A. I got the same—three dollars.

Redirect examination by Mr. Englar:

Mr. Englar: Mr. Goodrich, do you refuse to allow me to see this statement to examine Mr. Green at this time?

Mr. Goodrich: I do.

Mr. Englar: The statement you have just last referred to?

Mr. Goodrich: I do.

Mr. Englar: You propose to offer it in evidence later?

Mr. Goodrich: I decline to answer.

Mr. Englar: I notify you now that, in view of your refusal to let me see it, I shall object to its being offered in evidence or used in any way, you having prevented me from examining the witness about it now and even preventing him from seeing it or seeing what was in it.

189 Q. Do you remember who gave you the three dollars that you say you got on account of coming here?

A. If I can remember right, it was Mr. Peterson, and he gave it for my trouble.

Q. You didn't get anything from me, did you?

A. No.

Q. You say that you are a member of the Union now?

A. Yes, sir.

Q. When did you join it?

A. Well, I am not sure if it was last June or July.

Q. It was this year?

A. Yes.

Q. Had you ever been a member of it before?

A. Oh, yes, years back.

Q. Years back?

A. Yes, sir.

Q. But you were not a member of it at the time you entered the Edith Olcott?

A. No, not for a long time. No. The most part called me "scab."

Q. When you asked the captain the first day first for the necessary repairs for this inspirator, he told you to go and get them, did he?

A. Yes, sir.

Q. Did you at that time ask him for anything else?

A. I didn't know, I hadn't gone over, anything else that time; I didn't know if there was anything more.

Mr. Goodrich: I move to strike out the answer.

Mr. Englar: On what ground?

Mr. Goodrich: As not responsive to the question.

Mr. Englar: I do not think that is a ground that you can take advantage of, Mr. Goodrich. However——

Q. You didn't ask him?

190 Mr. Goodrich: Also upon the ground that it is incompetent, immaterial and irrelevant.

Q. Did you ask him for anything else at that time?

A. Not that time.

Q. The next day you did ask him for certain other things, did you?

A. Yes, sir.

Q. Do you remember the packing was one of those things?

A. Oh, yes, packing comes in. I remember that right enough.

Q. But you don't remember what else?

A. No.

Q. At that time did he tell you whether or not you could get that?

A. He didn't tell me I could get it. He said something; he was mad like; and he went away from me.

Q. Do you remember what he said?

A. No. I couldn't hear plain what he said; but he didn't say "yes" or anything, "go ahead," or anything like that.

Q. At that time did you tell him that you needed packing?

A. Yes, sir. I told him what I needed right enough—so and so what I needed.

Mr. Goodrich: I object to the question on the ground that it is leading.

Q. Did you tell the captain what you wanted on the second day?

A. I most likely told him what I wanted—without I would not ask.

Q. I don't want you to say "most likely." Did you or didn't you? Do you remember?

A. I mentioned some things. I didn't tell him all.

Q. But you did tell him—mention—some things you wanted?

A. Yes, sir.

Q. Do you know whether you mentioned packing?

A. I mentioned packing, yes.

191 Q. Did the captain at that time tell you there was any packing on board?

A. No.

Q. Have you within the last day or two read over a copy of this statement?

A. Yes, sir.

Q. The one that you gave here?

A. Yes.

Q. Is this statement as it now stands correct?

A. Yes, it is as correct as I can remember. In every detail it is correct.

Q. And at the time you swore to it did you believe it was correct in every particular?

A. Yes, sir; yes, sir.

Q. Do you still believe so?

A. Yes, sir.

Q. When you gave a statement before this man Moran in January of this year do you remember what you told him—what was in the statement?

A. Moran? I don't—

Q. The statement that you gave for Mr. Pendleton this year? Do you remember what was in that statement?

A. I remember some part of it. I can't remember at the time—there was different questions he asked me; so far that I couldn't remember.

Q. He asked you questions, and you answered them?

A. Yes, sir, I answered so and so.

Q. Did you read it over afterwards?

A. No. Mr. Pendleton did for me, and when he wrote it out I saw he did not put on the pumps and I see he had a pen, but I didn't see what.

Q. Just explain what you mean. Mr. Pendleton read you the statement, you say?

A. Read me the statement. But there was nothing mentioned about pumps; and I said to Mr. Pendleton before he marked it down.

Q. Before he marked it down?

A. Yes.

Q. Before he marked what?

A. About pumps—I told him that the pumps were out of order.

192 Q. Pumps were out of order? .

A. Yes, sir.

Q. What happened then?

A. Mr. Pendleton took a pen in his hand, and I thought he marked it down with a pen.

Q. Did you read what he marked down?

A. No, sir.

Q. What did you ask him to mark down?

A. I told him they was not in order.

Q. You asked him to write that on the statement?

A. Yes, sir.

Q. You told him you would not sign it unless he did?

A. Yes.

Q. And he took a pen in his hand?

A. Yes, he had a pen in his hand. I remember that.

Q. And did you understand that he was writing down that the pumps were in bad condition?

A. I thought that he did. I took his word that he did.

Q. Then do you know anything about that statement except what was read to you by somebody else?

A. No, sir.

Q. This statement that you made here you have read yourself, haven't you?

A. Yes.

Q. You know it to be correct?

A. Yes, sir. It was only two or three——

Q. Except for the corrections in pencil? Is that it?

A. Yes, sir.

Mr. Englar: I offer the statement in evidence.

Mr. Goodrich: Objected to as incompetent, immaterial and irrelevant.

(The paper offered is the one heretofore marked Exhibit A for Ident., Green, Oct. 31, 1912.)

Mr. Goodrich: Mr. Goodrich states upon the record that 193 he has not examined the statement of Mr. Green marked Exhibit A for identification. That is correct, is it not, Mr. Englar?

Mr. Englar: It is not necessary to state that. That appears from the record.

Q. Have you ever been sick in the hospital?

A. No.

Q. Have you ever been laid up so you couldn't work?

A. I can't remember a day in a vessel that I have been sick; I have been sick, but I always keep to my work; I have not been worse so I couldn't stand up and do my duty; I might have been sick so and so.

Q. How is your health?

A. Fine. All right.

Q. What is your nationality?

A. Swede.

Q. You are a Swede?

A. Yes.

Q. And is your native language Swedish?

A. Yes, sir.

Q. Do you speak English as fluently as you do Swedish?

A. No, sir; no, sir; no, sir; you can't expect; no, sir; I can speak some German, and I speak different languages.

Q. You have a little difficulty in speaking English, don't you?

A. Yes, that is right; yes; I understand it right enough, but I have difficulty to speak it, sir.

Q. When did you get a vessel after the Edith Olcott sailed—how long?

A. I can't remember, it was so very very long time. I went with the other brother in the Fred Davenport.

Q. In the Fred Davenport?

A. Yes, that vessel that left the last time.

Q. And was it a matter of a few days, or weeks, or what?

- A. I can't remember how long it was after. It was not so many days, I don't think.
- 194 Q. Not so many days?
- A. No. I can't remember.
- Q. Did the captain at any time tell you that anything you asked for was in any other part of the ship besides the engine room?
- A. No.
- Q. Never told you about any supplies for repairs in any part of the vessel?
- A. No.
- Q. Was there any reason why you did not want to go on the vessel except on account of the pumps?
- A. No, sir.
- Q. That was the only reason?
- A. That was the only reason; yes, sir.
- Q. Did you consider that she was safe to go with her?
- A. No. I told him that she was not. That is the reason only.
- Q. Were you anxious for the job?
- A. Yes, sir, I was.
- Q. How was you fixed financially at that time?
- A. Well, I was in pretty bad shape for the time; I had no money, and I owed for something in the house.
- Q. Did you have any reason to dislike Mr. Pendleton?
- A. No, sir; no, sir.
- Q. Did you have anything against him?
- A. No.
- Q. Or anybody connected with this case?
- A. No, sir.

Recross-examination by Mr. Goodrich:

- Q. You did not sign the statement till after the change was made about the pumps did you—Mr. Pendleton's statement?
- A. I thought that Mr. Pendleton signed it just before I signed my name.
- Q. Mr. Pendleton signed it?
- A. Yes, sir, that Mr. Pendleton, he had signed it, as he had the pen.
- 195 Q. Mr. Pendleton signed it?
- A. Yes.
- Q. What did he sign it for?
- A. I mean to say he put marks all about the pumps.
- Q. He did mark it in?
- A. I thought he did.
- Q. You looked at it, did you, before you signed it?
- A. Well, I looked over—some gentleman wrote it up for me, because I thought I couldn't write so good myself, and some gentleman wrote it for me; and I said I would not sign my name until it was all marked about pumps.
- Q. And it was marked about pumps, and you signed it?
- A. Yes, sir. I—
- Q. What is that?

A. I know he marked like something, and I didn't look at it—what he marked down.

Q. There was some mark made on it when you signed it?

A. I see that Mr. Pendleton had a pen in his hand, and was going to mark it on. I couldn't swear to it that he did so.

Q. Was the change made before you signed it?

A. It was before I signed it that I spoke to Mr. Pendleton that I couldn't sign my name at all before he marked about pumps.

Q. Did he make changes?

A. He promised to make the changes.

Q. Did he make them?

A. I suppose he did. It was what I expected.

Q. You saw the paper, didn't you?

A. I didn't read it.

Q. Did you see the paper?

A. I see the paper, yes.

Q. Was it typewritten or——

A. Yes, sir, typewriting.

Q. And you could tell the difference between typewriting and the pen writing, couldn't you?

A. Yes, I could.

196 Q. Did you look at the paper to see if pen-writing was made in it?

A. I didn't take notice.

Q. You didn't look at the paper at all? You just went ahead and signed it?

A. No, sir, I can't remember. I didn't see what Mr. Pendleton put. I thought he put it there when I saw he had the pen in his hand.

Q. Did Mr. Pendleton have a stenographer there to take down the words and afterwards write it on the typewriter? The gentleman here at your side is a stenographer, and he is taking down the words that I say and the words that you say. Was there a stenographer at Mr. Pendleton's office?

A. I think that was Mr. Pendleton's brother.

Q. And he took down the words and then afterwards wrote it out on a typewriter?

A. Yes.

Q. And the typewritten statement was brought, was it, into the room where you were?

A. Yes, sir.

Q. Did you say to Mr. Pendleton that you wanted the words said about the pumps being out of order?

A. Yes, sir.

Q. Before or after——

A. Before; before I could sign my name.

Q. No. Listen to me.

Mr. Goodrich: Strike out the answer, and read me the first part of the question.

Question put as follows:

Q. Before or after the paper was put into typewriting?

A. After the paper was through the typewriting.

Q. And how many sheets were there in the paper? Do you remember?

A. No, I don't remember how many sheets there was in the paper.

197 Q. And it was brought in and laid before you, was it?

A. That was brought in right enough, and some—

Q. Who were there?

A. Mr. Pendleton was there; and Mr. Pendleton's brother, I think—what I heard of it.

Q. Yes; and another gentleman?

A. Was it Mr. Hall?

Q. No?

A. No, sir.

Q. Mr. Hall was not?

A. Not what I seen. He went away. He took me up to the office.

Q. Was he there when you signed the paper?

A. No, not that I saw him.

Q. Before you signed the paper, consisting of two sheets of typewriting, did you ask to have it changed by the addition of certain words about the pumps; is that true?

A. Yes, sir.

Q. And you would not have signed it unless it had been changed, would you?

A. No, sir.

Q. And what were the words that you asked Mr. Pendleton to put in there?

A. I told Mr. Pendleton, I said, "There is nothing about pumps that was without water. You didn't put in nothing about that, Mr. Pendleton. So I can't put my name there and swear to that without you put that down."

Q. And when you did sign it the words were in there?

A. What I expect.

Q. And were written in with a pen?

A. Yes, I see Mr. Pendleton took a pen—when I said that I couldn't swear to it Mr. Pendleton took a pen, yes, and I think that he marked it on.

Re-redirect examination by Mr. Englar:

Q. Mr. Green, from what you heard when this statement was read before Mr. Pendleton, was there anything in that statement
198 which was contrary to this statement which you signed here?

A. Not what I can remember.

Q. Did you intend to swear to anything contrary to this statement?

A. No. I can't swear to anything else but the truth; I won't swear what I said is everything. That I couldn't remember. I would tell so and so; but it is so long time ago I can't remember that. I was two and a half days on the vessel, and I can't remember—

Q. So far as you remember the statement that you made to Mr. Pendleton, was it the same as the statement you made to us?

A. It ought to be pretty near right, because I said exactly to Mr. Pendleton what I could remember, as I said here. I said to Mr. Pendleton the same words as I can possibly remember.

Q. How did you come to make a statement before Mr. Pendleton?

A. The shipping master was after me many times and wanted me to go up to Mr. Pendleton, and Mr. Pendleton wanted to see me; day after day he came to me, either in the house or in the street. So I said "All right, I will go up to Mr. Pendleton."

Q. What happened after you got there?

A. Mr. Pendleton said he was glad to meet me; so far he was looking for me.

Q. What else happened?

A. He wanted me to give a statement so and so. He asked me if I was in the Edith Olcott. I told him yes, for a couple of days or so; I couldn't remember so long, I said.

Q. And then he asked you questions? Is that it?

A. Yes.

Q. And you answered him?

A. Yes.

Q. And then it was written out?

A. Yes.

Q. And then you signed it?

A. Yes.

199 Q. Before you signed it you understood that Mr. Pendleton was writing down about the pumps being in bad condition?

A. Yes.

Q. Suppose the statement were produced and it didn't have anything in about the pumps being in bad condition, how would you explain that?

A. Well, I took Mr. Pendleton by his word, as he took the pen.

Q. When you signed that statement did you think that was in there?

A. Yes.

Mr. Englar: I wish to again put on the record that, in view of the refusal to show this supposed statement taken on behalf of Mr. Pendleton either to the witness or to myself, I consider it wholly inadmissible in evidence, and shall object to its being used in any way in connection with this case.

I wish to say further that the witness is clearly entitled to an opportunity to read the statement and to make any explanation he wants to make in connection with it, if any such be needed; and in view of the refusal of counsel to give him that opportunity, I consider the statement inadmissible at any later stage of this proceeding, and shall make my objection if it be offered.

I move to strike from the record of today's proceedings so much as refers to this statement, or to its being marked as an exhibit, or mentioned in any other way, on the grounds of the objection above stated.

Re-recross-examination by Mr. Goodrich:

Q. What kind of pumps did this vessel have?

200 A. Well, sir, I couldn't tell you; I didn't look at the name of them. And what I call those pumps—I call them old-fashioned style. I didn't look at the name of them.

Q. How long is the stroke?

A. The stroke?

Q. The stroke of—

A. The stroke is up and down on them.

Q. How many pumps were there on the whole vessel?

A. Well, I couldn't say how many hand pumps she had. We were never without the captain or somebody like that. When the captain asks me to look after the hand pumps, then I look after them. I couldn't tell how many hand pumps there were. But there were three steam pumps; one for deck, and for to pump water from the fresh-water tank below in the feed tanks. There were—that was what the small pump was for the deck.

Q. The main pumps were double pumps?

A. Yes.

Q. How many pumps did you have on the Davenport?

A. On the Davenport? Three steam pumps on the Fred Davenport.

Q. What are they?

A. I don't remember the name of this. They are the new style; one wrecking pump, one circulation deck pump and one fresh water. They are later style, I mean to say.

Q. How many pumps that pump water out of the hold of the ship?

A. On the Fred Davenport?

Q. Yes.

A. One.

Q. How much packing did you need there on the Edith Olcott—how many pounds?

A. On a trip like that we always ordered a little more than required. In all the vessels I go in they always buy a little more than they use for the trip.

201 Q. How much did you need? Don't give this long answer. Answer me in pounds. How many pounds did you need?

A. I couldn't tell you how many pounds I need.

Q. What kind of packing did you want?

A. They have got different kinds of packing. It all depends on the pumps. You understand that when I am looking at the pumps I can tell the packing that is required for them.

Q. What kind of packing did you want?

A. I can't remember. I can say—

Q. Never mind. That is enough.

A. There are so many names of it. I can give fifty names.

By Mr. Englar:

Q. The kind of packing that you need you say depends on the kind of pump, doesn't it?

A. Yes.

Q. And when you wanted packing you wanted the kind of packing that was made for that kind of pump?

A. Yes.

Q. Do these pumps require special packing?

A. No, no special packing.

Q. What kind of packing do they need?

A. Well, I can't say. I can't tell if there was some of those pumps got a collar packing. Some of them got it; I have forgot the name of it.

Q. The kind of packing that you need depends on the kind of pump? Is that it?

A. Yes. It all depends upon the pump. Some of those pumps takes perhaps a so-and-so collar. If I could get the name of it—

Q. And others, you use some kind of hemp—

A. Yes.

Q. Or flax, to pack them? Is that it?

A. Yes. Some would use flax—and square flax; some would use—I can't pronounce it.

Q. But you don't remember what kind of pumps these
202 were?

A. No. I didn't look at the name of the make of them.

Q. But when you asked for packing did you know what you wanted?

A. Yes, sir, I knew what I wanted. If I can order to the store I would take them over what pump. I was not going to run right away to the store; I was going to take the pumps apart and see what was the trouble with them.

Q. And then you were going to buy your packing after that?

A. Yes.

By Mr. Goodrich:

Q. Did you ever go into the after cabin of this boat?

A. Yes. The after cabin? Excuse me, I don't know about that. Excuse me, I didn't mean to say that. No, I don't know if I was in the after cabin.

Q. Did you ever take the pumps apart?

A. No, sir.

Q. So you never sounded through the pumps?

A. No, sir. I couldn't say—some of those kinds of pumps you need not take apart to sound; you just lift up a couple of flappers and see the lower doors. I can't remember.

Q. You don't remember what sort of pumps these were, and whether you could do that on these pumps?

A. No.

Q. You do not?

A. I have been in a vessel four years and I don't remember what I sound.

By Mr. Englar:

Q. But you do remember that you sounded?

A. Yes. I do that in any vessel, especially with cargo. I have done that in other vessels with the same kind of cargo.

Q. But do you remember that you sounded in this vessel?

A. Yes.

203 Q. How much water was in it?

A. I can't remember.

By Mr. Pendleton:

Q. How much water would it take to be in the bottom of a vessel for an eight-inch wrecking pump to catch water?

A. We say 15 to 16 inches we can lift the water.

Q. How deep is the vessel's timbers?

A. That all depends. Some vessel's timbers—let me see—some vessel's timbers—it is not long ago that I put all the suction in myself, but I can't remember now. Say 14 inches. Something like that. I can't remember now.

Libellant Rests.

Mr. Goodrich offers in evidence the depositions of Adam Charles Bellman, mate on the Olcott; Christian Hansen, cook and steward; John B. Morris; Joseph O'Toole; Montgomery L. Snodgrass; George Ferguson Wright; Frederick A. Wallace and William Holm.

204 *Deposition of Adam Charles Bellman.*

United States District Court, Southern District of New York.

In Admiralty.

BENNER LINE, Libellant,

vs.

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Bros., and Fields S. Pendleton, Individually, Respondents.

Deposition of Adam Charles Bellman, Taken at No. 85 Exchange Street, Portland, Maine, July 6th, 1912.

Appearances:

Howard S. Harrington, Esq., of Harrington, Bigham & Englar, for Libellant.

Benj. Thompson, Esq., William H. Gulliver, Esq., Proctors for Libelee.

Stipulation.

It is stipulated that the deposition of Adam Charles Bellman may be taken stenographically by Edward J. Connor, a Notary Public in and for the State of Maine; signing, sealing, certification and filing all waived, stenographer's fees to be taxed as disbursements, copy to be furnished either side; and deposition may be used by either party

before a Commissioner or Court, or both, with the same force and effect as if the witness were personally present and so testified.

205 ADAM CHARLES BELLMAN, having been first duly sworn, testified as follows:

Direct examination by Mr. Gulliver, representing libeliees:

Q. State your full name?

A. Adam Charles Bellman.

Q. What is your business?

A. I am a seafaring man.

Q. How long have you been following the sea?

A. 22 years.

Q. What has been your sea experience?

A. I have been going from sailor up to mate.

Q. How many years have you been sailing as mate?

A. Seven years.

Q. What class of vessels have you sailed in as mate?

A. Mostly schooners and barkentines.

Q. In coastwise trade?

A. Yes.

Q. On the Atlantic Coast?

A. Yes, the Atlantic Coast.

Q. In July, 1910, state whether or not you shipped as mate on board the Schooner "Edith Olcott?"

A. Yes, sir.

Q. Do you remember what day it was you shipped?

A. I shipped the 23rd and came aboard the 24th of July.

Q. Where was the vessel lying at the time you went aboard of her?

A. She was lying at Black Tom, New Jersey.

Q. That was on the 24th of July?

A. I came aboard Saturday.

Q. How long did you remain aboard the schooner?

A. I came aboard Saturday morning at six or seven o'clock and left the following Saturday when the vessel was loaded.

Q. And you shipped as mate on this schooner?

A. I shipped as mate until the vessel was loaded.

206 Q. What service did you perform aboard the schooner as mate?

A. I received the cargo and signed the bills and took charge of the vessel in most everything.

Q. Was part of your cargo on board at the time you went aboard?

A. Yes, about two-thirds loaded.

Q. With what?

A. Cement and railroad iron.

Q. Now, while she was lying at the dock at Black Tom, — whether or not you had occasion to use the vessel's pumps?

A. No, I did not at Black Tom.

Q. When did you first have occasion to use them?

A. The day I came aboard we left Black Tom for Pier No. 11, South Street. On the way going over we used the big wrecking pump.

Q. Do you refer to the steam pump when you say wrecking pump?

A. It is the steam pump, the wrecking pump.

Q. Where is it located?

A. In the forward house, in the forward part, inside.

Q. What part of the hold does the pipe of that pump reach into?

A. It goes down right through.

Q. Down through what?

A. Into the engine room.

Q. How long did you use that pump?

A. I should say about three minutes. Of course, the vessel does not leak. She was about on an even keel at the time.

Q. Did you suck her out with the steam pump?

A. Yes, sucked her out.

Q. How did the pump work?

A. First rate, was in first-class condition.

Q. Did it lift the water without any difficulty?

A. Lifted it right up.

207 Q. What do you say as to the working order and condition of the engine and boiler at that time?

A. The engine and boiler were in first-class condition.

Q. Did you look the vessel over carefully during the time you were on board?

A. I was down in the hold twice, the vessel was in first-class condition.

Q. What, if anything, did you notice as to the condition of the seams and butts?

A. They were in first-class order.

Q. Smooth or rough?

A. Smooth.

Q. What did you notice about the standing rigging, sails, etc.?

A. All of that was in first-class order.

Q. What do you say as to the condition of the decks?

A. Decks were all first-class.

Q. What do you say as to the water ways?

A. All first-class, everything first-class.

Q. What do you say as to the chain plates?

A. Everything fine.

Q. After you got over to Pier No. 11 South Street, state whether or not you made any further use of any of the pumps on the vessel?

A. I noted the cargo in every hatch and used the hand pump.

Q. Which hand pump did you use?

A. I think I used the starboard pump; she had a little list to starboard.

Q. Where is that starboard pump located?

A. In the forward part of the after house.

Q. How long did you pump with that?

A. Don't think I pumped over three or four minutes.

Q. Did you use it more than once?

A. About twice.

Q. Did you take an additional cargo to Pier No. 11 South Street?

A. Yes, took general cargo.

208 Q. How did that hand pump work?

A. It worked first-rate but heavy on account of the distance that the water had to come from down below.

Q. Was the "Edith Olcott" a deep vessel?

A. Yes, a deep vessel.

Q. What effect did the depth of the vessel have on the working of the pump?

A. The higher you have to throw the water, the heavier it goes.

Q. State whether or not that hand pump took care of the water without any trouble?

A. Fine, it was a good pump.

Q. How many hand pumps did she have?

A. Two aft.

Q. Whether or not she had any messenger pumps?

A. Two messenger pumps in the after part of the forward house.

Q. What size pumps were the two hand pumps? What kind of pump?

A. Ordinary Russell pumps.

Q. What was the size of the steam wrecking pump?

A. Six or eight inch pipe.

Q. What do you say as to the size and character of the messenger pumps?

A. About the same as a Russell pump, I should say. Of course, it is this order of pump.

Q. Will you state what was the general condition of the vessel as to seaworthiness?

A. She was in first-class condition.

Q. Whether or not you wet the vessel down while over at Pier 11?

A. We wet her down every evening.

Q. What pump furnished the water to wet her down with?

A. The force pump.

Q. How did that work?

A. Worked first rate.

Q. Was this force pump operated by the boiler and engine in the forward part of the vessel?

A. In the forward house, yes.

209 Q. What do you say as to how much water the vessel was making during the time you took her out, during the several times you took her out?

A. While I took her, I should say she was making no water to speak of.

Q. What sort of a vessel would you call her as to leaking?

A. I would call her a solid built vessel, a first-class vessel.

Q. Would you call her a dry vessel?

A. A dry vessel, yes, sir.

Q. Were you in the hold during any of the time the cargo was being put on board?

A. I was down there twice.

Q. Did you notice anything out of order or out of the ordinary?

A. No, sir, I thought everything was in first-class shape.

Q. How long did you stay by the vessel?

A. I stayed by the vessel until the vessel was loaded.

Q. What was your reason for not continuing in her?

A. I came aboard to take care of the vessel until she was loaded. I did not intend to make the trip when I went aboard.

Q. You did not intend to make the voyage?

A. No, sir, I did not intend to make the voyage when I went aboard.

Q. You say you pumped her out with the starboard hand pump. Whether or not during the time she was taking cargo, you used the port pump?

A. I cannot remember whether I pumped her out with the port pump. Pumped her out twice with the starboard pump. She always had a little list to starboard, the water went right over the side.

Q. Was the engineer on board the vessel at the time you used the steam pump going across?

A. Yes, sir.

210 Q. Did you observe the working of the engine and boiler that time?

A. Yes sir.

Q. What experience have you had with engines and boilers?

A. In mostly all the vessels I have been in, I usually go in the engine room and see if things are all right. I have been working around engines most all the time. Sometimes I go as mate and engineer.

Q. How did the wrecking pump, messenger pumps and the hand pumps and the boiler and engine aboard the "Olcott" compare with the same sort of equipment on other vessels of the same size and class?

A. About the same. Everything was in good condition, first-class condition.

Cross-examination by Mr. Howard S. Harrington, representing Benner Line:

Q. On what vessel are you now employed?

A. Well, I have no vessel. I left the vessel "Fortuna." I left the Fortuna because it took a fishing trip, smelled strong. I left her and came to Boston. Then I came down here intending to get something down here. They are all big vessels down this way and they pay more money.

Q. You are looking for a job now?

A. Yes, looking for a job now; I think I will get one before long.

Q. Have you any job secured?

A. Down to Winslow's at Clark's.

Q. Have you got a job?

A. I haven't got it yet, but think I will today or tomorrow.

Q. What vessel do you expect to go in?

A. I don't know yet. He promised me if he had anything, he would give it to me.

Q. Have you a license of any kind?

A. No, sir, I have no license. I brought myself up, a license is not required now.

211 Q. What vessels have you sailed on in the last two years?

A. I have sailed in schooners and barkentines.

Q. Can you name some of them?

A. I have been in several, for instance the "John H. May"; I have been on and off of her for seven years. I have been in the "Edwina," I have been in the Eleazer W. Clark, Blanche H. King, and a number of vessels. I have been in the "Edith Sheridan," I have been in about thirty; I have been in the Melbourne Smith.

Q. About 30 altogether?

A. Yes, about 30.

Q. Have you ever sailed in any of Pendleton's vessels?

A. I have been in this "Fortuna," that is Mr. Pendleton's. It is lying down in Plymouth now; it is a fish craft.

Q. Have you been in any others of his?

A. The "Olcott" was one, Blanche King, but Mr. Pendleton did not own her when I was in her.

Q. You have shipped a good deal on these vessels then?

A. Oh, yes.

Q. Will you explain a little more fully why it was that you did not sail with the "Olcott" on the voyage when she was lost?

A. I didn't want to go in her. That was my intention when I came aboard. Mr. Fletcher told me to go aboard and take care of and handle all the cargo and see that everything was all right in the vessel. That was the understanding with Mr. Fletcher when I went aboard. I did not intend to go in the vessel and make the trip.

Q. Why not?

A. I did not like to go to the West Indies at that time of year.

Q. With respect to the pumps, you used the wrecking pump once?

A. Yes, used it once that time coming from Black Tom to New York.

Q. And you used the starboard hand pump once?

212 A. Used that twice. I could not say whether I used the other pump or not, but don't think I did.

Q. The time you used the wrecking pump, you had it working about three minutes?

A. About three minutes, yes.

Q. When you used the starboard hand pump that was also used a period of three or four minutes?

A. About that, yes.

Q. The vessel didn't make any water?

A. The vessel was a tight vessel.

Q. That is really all you had to do with the pumps?

A. Yes, that is all I had to do with the pumps.

Q. Of course, you made no inspection?

A. No, I did not make any inspection because the pumps were working good. As soon as we started, they started working.

Q. You didn't examine the pipes?

A. We didn't examine any pipes, because when you start the pumps and the pumps work, you don't examine them.

Q. The fact is, you did not?

A. Yes, that is right.

Q. Who was the engineer who was on duty at the time you used the pump?

A. A young fellow, he lived there. Some coal came down on Pier 11 in New York, and I told him to go himself and set away that coal. He said he did not come aboard to work alongside the dock.

Q. You don't remember his name?

A. I don't remember his name. I told him to set the coal away and he said he wouldn't. I told Captain Fletcher first, and I told him to get out.

Q. Did you discharge him?

A. Yes, I told the Captain first though.

213 Q. Did you have anything to do with employing the man?

A. No, sir. That was entirely with Captain Fletcher. I had to be aboard in the day time. Captain Fletcher employed whoever he wanted.

Q. This was the first time you had ever been on the "Olcott"?

A. Yes, the first time I had been on the "Olcott."

Redirect examination by Mr. Gulliver:

Q. Whether or not, mate, the Edith Olcott was the first vessel of Pendleton's fleet you had ever sailed in?

A. Yes, that is the first. I think it is the first vessel. I have been in vessels where I did not know the company that owned them.

Q. So far as you know the Olcott was the first Pendleton vessel?

A. Yes.

Q. And what vessels belonging to Pendleton have you sailed in since you were on board the Olcott?

A. Only in the Fortuna.

Recross-examination by Mr. Harrington:

Q. How long were you in the Fortuna?

A. About two months and a half in the Fortuna, lying all the time alongside the dock in Plymouth.

Q. I understood you to say in your cross-examination that you had sailed a good deal in Mr. Pendleton's boats.

— Last winter I was in mostly all of Mr. Pendleton's vessels fixing them up, like the Sallie Ion down here.

Q. You were working for Mr. Pendleton last winter?

A. On and off. Something to do, once in a while I worked for Mr. Pendleton. I have been watchman. I did not want to go to sea last winter because my wife was sick all the time. I got little jobs aboard vessels fixing them up.

214 Q. What were you doing the winter before last?

A. I was sailing then, I was not married then.

Q. What ship were you on then after the Olcott was lost?

A. After the Olcott was lost I went into the Melbourne B. Smith.

Q. Who owned her?

A. Smith & Bros.

Q. How long did you stay in her?

A. I went to Pensacola and back, I should say about three months.

Q. What vessel were you in after that?

A. I went back into the John H. May.

Q. Who owned her?

A. May & Company in Philadelphia.

Q. How long were you in her?

A. Made a trip down to Wilmington and back.

Q. When did you start in on this round of working for Mr. Pendleton?

A. After I got married.

Q. When was that?

A. I got married the tenth day of September.

Q. Last September?

A. Yes, I got married at Wilmington. I could not see anything to do in Wilmington. She did not want to let me go to sea. I went to New York, had a watchman's job in New York. I went around to do little something in the harbor. I met Mr. Pendleton's brother here and asked him if he had anything to do. He said he had a little job but that it didn't pay much. I asked him to give me something to do.

Q. When were you first spoken to about the condition of the Edith Olcott?

A. I heard the Olcott was lost when I came to Pensacola. I asked if any lives were lost. He says "No." I says, "That is good." I says, "a vessel like her ought to go around Cape Horn."

215 Objection by Mr. Harrington to last part of answer.

Q. When were you first asked what you knew about the "Olcott" to testify in this case?

A. Captain, I forget his name, he was in the Melbourne B. Smith.

Q. Who is he?

A. I think his name is Tumbling.

Q. What took place? Did he ask you what you knew about the Olcott?

A. He came aboard Sunday morning. He had been ashore and got the papers. He told me the Olcott was lost.

Q. About the testimony here today, when were you first spoken to about it, asked what you knew to testify?

A. He asked me what kind of a vessel she was. I said the Olcott was a strongly built vessel, one of the finest vessels I ever saw. •

Q. Was this one of Mr. Pendleton's vessels you are speaking of?

A. Yes.

Q. The Melbourne B. Smith, was not one of Mr. Pendleton's?

A. No, one of Smith's vessels, Melbourne B. Smith & Co.

Q. He did not ask you to testify in this case?

A. No.

Q. When were you first asked to testify in this case?

A. Oh, I know what you mean now. I went up to the office one day, Mr. Pendleton's office, and Mr. Pendleton asked me what kind of a vessel the Olcott was. So I told him the Olcott was a first-class vessel.

Q. When did that take place?

A. I don't know just when it was now.

Q. When did that take place?

A. I don't know when that was. Let me see, some time last year.

Q. Do you remember whether it was before or after you got married?

A. After I got married.

Q. Just after?

A. When I came to New York.

Q. After being married?

A. Yes.

216 *Deposition of Christian Hansen.*

United States District Court, Southern District of New York.

BENNER LINE, Complainant,

vs.

FIELDS S. PENDLETON and Another, Defendants.

NEW YORK, October 1st, 1912.

Deposition of Christian Hansen, taken de bene esse before me at the office of Henry W. Goodrich, 49 Wall Street, New York City.

GEORGE H. SELLERS,

Commissioner.

Appearances:

Harrington, Bigham & Englar, for libellant. (By Mr. Englar).
Henry W. Goodrich, Esq., for respondents.

It is stipulated that the testimony may be taken by the stenographer whose fees shall be taxed as a disbursement. Copy of the testimony to be served on libellant's proctors.

CHRISTIAN HANSEN, a witness being duly sworn, testified as follows:

Direct examination by Mr. Goodrich:

Q. What country are you from?

A. I was born in Denmark.

Q. How old are you?

A. 65—but I belong to New York.

217 Q. When did you come to this country?

A. 1861.

Q. And do you follow the sea?

A. I do, yes, sir.

Q. What positions have you held on sailing vessels?

A. I have held the position as sailor, mate, second mate, cook and steward of late years, boatswain.

Q. Do you remember the schooner Edith Olcott?

A. I certainly do.

Q. Were you on her in July, 1910, when she was at Black Tom, New Jersey?

A. Yes, sir.

Q. In what capacity were you on board?

A. Cook and Steward.

Q. Had you signed articles to go in her?

A. No, sir.

Q. Did you intend to go in her?

A. I was, yes.

Q. You were not to sign until all the crew were signed, is that right?

A. That is generally the rule.

Q. How long did you remain in the vessel?

A. 11 days, sir.

Q. In that time where did the vessel go?

A. Went from Black Tom to Pier 11.

Q. East River?

A. Yes, sir, right down there.

Q. Who was on board with you during that time?

A. The captain and the mate and me.

Q. What was the captain's name?

A. His name was Fletcher.

Q. And during the 11 days that you were on board was the vessel pumped?

A. Yes, sir.

Q. Did you take part in it?

A. I did; I drew the water.

Q. What pumps did you use?

A. Twice the aft pump, and perhaps once the steam pump.

218 Q. You mean the hand pumps aft?

A. Yes, sir.

Q. On both sides of the vessel?

A. Only one.

Q. And how many times were the hand pumps used?

A. Twice.

Q. And what about the steam pump?

A. We only used it once.

Q. What have you to say as to the working of the pumps and their condition?

Mr. Englar: Just a moment. I object to his stating the condition of the pumps until some further foundation is laid for such testimony from this witness.

Q. Answer the question.

A. They worked all right when I was there. Only worked it once.

Q. And the hand pumps you worked twice?

A. Twice, yes, sir.

Q. Did you have any difficulty with them?

A. No, sir.

Q. How long did you have to pump each time?

A. 3 or 4 minutes—might be 5.

Q. And then the pump sucked?

A. Sucked, yes, sir.

Q. Did you see the stores brought aboard the vessel?

A. I did, yes.

Q. Did you have anything to do with them?

A. I stowed them all away.

Q. Where did you stow them?

A. Some down in the lazarette, some down in the amidehips house.

Q. And where else?

A. Down in the cabin.

Q. What have you to say as to the stores?

A. The most stores that I ever saw come aboard a schooner in my life. I reckoned there was between seven or eight hundred dollars' worth of provisions came there.

Q. Did you look in the engine room?

A. I did, several times, sir.

Q. What was its appearance?

A. Very nice, to me.

Q. You are not an engineer?

A. No, sir.

Q. And you do not know anything about an engine technically?

A. No.

Q. Did you sail in the vessel?

A. No, sir, I did not.

Q. Why not?

A. Because the captain and me had a falling out.

Q. Were you there when the vessel went to sea?

A. I was down on the dock when the union sailors came down and threw rocks and stones on board of the vessel.

Mr. Englar: I move that that testimony be stricken out as grossly irrelevant and immaterial.

The Witness: I was right down on the dock.

Q. How do you know they were union sailors?

A. They claimed they was to me, that's all I know.

Mr. Englar: The same motion on the same grounds.

Q. Did the vessel have a good deal of difficulty in getting away?

A. No, they brought a crew on a tugboat and got the crew on board—and the fellows throwing rocks and stones on board the vessel.

Mr. Englar: Same objection, same motion on the same grounds.

Q. Did you see any men jump overboard?

A. Not that I know of.

220 Mr. Englar: Same motion on the same grounds, same objection.

A. Not that I know of. I never saw a man jump overboard from the vessel.

Q. From the wharf?

A. A Happy Hooligan who had some drinks in him—might have swung out there.

Cross-examination by Mr. Englar:

Q. What was the nature of your quarrel or difficulty with the captain?

A. Because I had one whiskey too many.

Q. You or the captain?

A. No, me, blame it to me. I never blame another man only myself. It is no need to go and say a lie for anybody.

Q. Give us a description of the pumps upon the Edith Olcott, how many did she have?

A. Two in the engine room, so far as I know, two pumps aft, hand pumps—whatever you call them.

Q. You do not know much about pumps?

A. I can pump all right. I do not know the name that you call them.

Q. You do not know anything about the construction of pumps?

A. No, sir, I do not.

Q. All you know is that you pumped two or three times?

A. Twice with the hand pump and once with the steam pump—that is all I know. When the pump would not catch the water, would have to wet the pump.

Q. You had to draw a bucket of water and pour it on the pump to start the pump?

A. Yes, sir.

Q. And you pumped?

A. Yes, sir.

Q. Was the schooner leaking badly at that time?

A. She was not leaking whatsoever.

Q. She was not leaking at all?

A. No, sir—well, I might pump two or three minutes—always make a little water—she wasn't leaking.

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Deposition of John B. Morris.

United States District Court, Southern District of New York.

BENNER LINE

VS.

FIELDS S. PENDLETON, Defendant.

Before J. B. McCarthy, Notary Public.

NEW YORK, October 10th, 1912—3 o'clock p. m.

Appearances:

Mr. Englar, for the Benner Line;

Mr. Goodrich, for the defendant.

Deposition of Witness on Behalf of Defendant, Taken under the Same Stipulation as Before.

JOHN B. MORRIS, being duly sworn, as a witness on behalf of defendant, testifies as follows:

Examined by Mr. Goodrich:

Q. What is your business?

A. Sailorman, master.

Q. How long have you followed the sea?

A. Since I was 16 years old.

Q. How old are you now?

A. 52 in November.

Q. How long have you held a master's license?

A. I have been going as master since I was 21.

Q. Do you know of the schooner Edith Olcott?

A. Yes; I was master of her.

222 Q. During what period were you master of the schooner?

A. From about the 20th of February until the 16th of

April.

Q. Of the year that she was lost?

A. Yes.

Q. What trip did you make in her?

A. From New York to Fernandina, Florida.

Q. Where did you join her—in New York?

A. In New York Harbor.

Q. Was that when Mr. Pendleton first bought her?

A. Yes, sir, that was the time.

Q. Were you first the master of her, from the time she was first owned by him?

A. Yes.

Q. Who went in her on the second voyage?

A. Captain Fletcher.

Q. He succeeded you, did he?

A. He relieved me, yes.

Q. Is he the senior captain in the Pendleton service?

A. He is.

Q. He displaced you, did he?

A. Yes.

Q. What did you take out from New York to Fernandina?

A. Nothing, but we brought back railroad ties.

Q. You were in her something about two months, you say?

A. Yes, sir, about that time.

Q. Did you examine the vessel before you went in her—did you look her over?

A. Yes, practically.

Q. What was her condition?

A. Good.

Q. Did you at any time examine her pumps?

A. Yes, sir.

Q. When did you do that?

A. I examined them on the passage out and all the way home. My last examination was in New York before I left her.

Q. On the voyage out or the voyage back was the schooner leaking?

A. She made more or less water, yes sir.

223 Q. Any different from what vessels ordinarily do?

A. Nothing—the same as on all good vessels; they will always leak more or less.

Q. How often would you have to sound the pumps?

A. We would sound the pumps every four hours—every night and morning—pump her out every morning.

Q. Do you remember how much pumping you had to do on the trip?

A. I never counted it.

Q. Well, was it anything unusual?

A. It was nothing unusual, no.

Q. What pumps did you use in clearing her?

A. The steam pumps.

Q. What steam pumps had she?

A. She had a steam wrecking pump in the engine house and two diaphragm steam pumps on deck.

Q. Where were they, the diaphragm pumps, with reference to the engine house?

A. They were just aft the engine house.

Q. Were they boxed in?

A. No.

Q. How many hand pumps did you have?

A. She had two hand pumps.

Q. What have you to say as to this equipment of five pumps on a vessel of her size as compared with ordinary vessels?

A. It is much more than the average.

Q. What is the average equipment as to pumps?

A. The average equipment would be three pumps.

Q. Describe them?

A. Two hand pumps and one steam pump.

Q. Tell me what examination you made of the pumps just before you left her in New York?

A. Her steam pumps were taken all apart; the engineer and I did it, and new springs placed in them, and the vessel was pumped out while she was down by the head—she was three or four feet
224 by the head. There was quite an amount of water pumped out.

Q. What pump or pumps were used?

A. We used both the steam pumps.

Q. That is the wrecking pump and the diaphragm?

A. The wrecking pumps were overhauled and we put new springs in it.

Q. After she was overhauled?

A. Yes.

Q. Did you examine the piping?

A. As far as you could see it.

Q. How far could you see?

A. Down between decks, not in the lower hold.

Q. Why not?

A. They run the box to protect it from getting broke.

Q. What was the condition of the pipes in and around the engine and in between decks where you could examine it?

A. They were in first-class condition, as good as they were when they were put in her.

Q. What have you to say as to the messenger pumps—did you do anything to them?

A. It wasn't necessary; they were in good condition.

Q. Did you examine them?

A. Yes.

Q. How far did you examine the piping?

A. Didn't examine that much; it hadn't been in the vessel very long. They were new pumps—they were practically new pumps.

Q. So far as the examination you were able to make, what was the condition of the messenger pumps?

A. They were good—in first-class condition.

Q. Was that demonstrated by their use?

A. By their working, yes.

Q. Did you use them?

A. Yes; I seen them work the day we repaired the wrecking pump.

Q. Did you examine at any time the hand pumps.

225 A. Only by looking at them. I never used them any more than—

Q. What was the result of such examination?

A. We would never use a pump on a vessel when she is loading or discharging unless she is down by the stem—

Q. That is when the steam pumps won't work?

A. Yes.

Q. Do you remember using the hand pumps?

A. We didn't use the hand pumps, but I know they were in good condition, yes.

Q. How do you know that?

A. You can always tell a hand pump by looking at it.

Q. At the time you left the vessel in the Port of New York in April, what was her condition as to seaworthiness?

A. I should say she was in very good, seaworthy condition.

Q. In every department?

A. Every department.

Q. Her pumps and everything else?

A. Yes, as well as gear and everything else for a six months' trip anyway.

Q. Did you put the stores aboard of her?

A. I did.

Q. What have you to say as to the completeness of the stores?

A. I say when I left the vessel she was completely outfitted for six months.

Q. What about her boiler—was that a covered boiler?

A. Yes, asphalt covered.

Q. Do you mean asphalt or asbestos?

A. It was asbestos covering.

Q. Did you see any signs of salt water on it?

A. No, sir.

Q. On any part of it?

A. No, sir, on no part of it.

Q. How fast would the three pumps, the wrecking pump 226 and the two messenger pumps, clear that vessel?

A. Well, either pump separately could take a foot of water an hour.

Q. And if combined?

A. It would take double.

Q. What sort of weather did you have on your trip?

A. We had heavy gales both going and coming.

Q. How did the vessel behave?

A. The vessel behaved very good.

Q. Did you take in any water?

A. On the passage home more or less, but she is a very good sea-boat.

Q. Did she take it in to any such extent that you had to do any unusual pumping?

A. Nothing unusual.

Q. How were her decks?

A. Her decks were in good condition.

Q. Were they tight?

A. I never saw any signs of leaking.

Q. What have you to say of her as a bad weather boat?

A. She was as good as ever I was in.

Q. How many vessels have you been in?

A. Well, one hundred or more.

Q. Supposing that between the night sounding of the pumps and the next morning's soundings of the pumps on the Edith Olcott so much water had come into the vessel that some five or six feet was discovered at the morning sounding, and supposing the weather to have been not more severe than the weather you have described that

you had with her on the trip to Fernandina and back, how can you, as an expert mariner, account for the amount of water in her hold?

A. I shouldn't call it on account of any weakness of the vessel.

Q. What would be your explanation?

A. It might be some accident from outside.

227 Q. What sort of accident do you mean?

Mr. Englar: Objected to as mere speculation.

A. Well, she might collide with something that would cause her to leak. It wouldn't be anything caused from the weakness of the vessel.

Mr. Englar: We move to strike out the answer.

Q. Have you seen in your experience at sea floating obstructions on the water?

Mr. Englar: Same objection as before.

A. Yes.

Q. Of what nature have they been?

A. I have seen them of all kinds—spars, sticks of timber, wrecks of vessels.

Q. Have you ever, in your experience, collided with any of these obstructions?

Mr. Englar: Same objection as before, also as incompetent, irrelevant and immaterial, and we move to strike out the last answer.

A. No.

Q. From your experience with the Edith Olcott and from your general experience with vessels on this coast, do you think the Edith Olcott could have had five or six feet of water in her between soundings without having struck an obstruction?

Mr. Englar: Objected to on all the grounds previously stated, and on the ground that the witness is not qualified to answer such a question; also on the ground that that is the very question the Court has to pass upon.

228 A. Well, it looks impossible for a vessel built as she was built and from what I know of her strength, to have that amount of water, unless it would be from some unusual accident.

Mr. Englar: We move to strike out the answer.

Q. Have you done any shipbuilding in your life?

A. I have been around shipyards ever since I can remember.

Q. Are you a master mechanic?

A. No, sir, but I can model a vessel or mold one.

Q. Have you helped to construct one?

A. Yes.

Q. What have you to say as to the strength of the construction of the Edith Olcott as compared with the general run of vessels?

A. Well, when she was built she was built extra strong—much better than the average vessel was built.

Mr. Englar: We move to strike out the whole of the answer as in-

competent, irrelevant and immaterial, on the grounds that the witness is not qualified to answer.

Cross-examination by Mr. Englar:

Q. You took this vessel in February, 1910, did you?

A. Yes, the 20th.

Q. And you left her in April, 1910?

A. Yes, the 16th.

Q. What vessel are you in now?

A. The schooner R. P. Pendleton.

Q. Is she one of Mr. Fields Pendleton's boats?

A. Yes.

Q. Mr. Pendleton who is here now in this room?

A. He is general agent and managing owner.

Q. You are employed by him?

A. Yes.

Q. Were you employed by him on this voyage in the Edith Olcott?

A. Yes.

229 Q. Did you want to leave the Edith Olcott or did Mr. Pendleton want you to leave her?

A. He wanted me to leave her—that is, he didn't want me to leave her as I understand it, but he had a senior captain to go in her and he preferred that vessel.

By Mr. Goodrich:

Q. Who preferred the vessel?

A. Captain Fletcher.

By Mr. Englar:

Q. When you took the boat I believe you said you took some of her pumps apart; was that before you sailed?

A. After we returned to New York, before she sailed on the next voyage.

Q. I understood you to say that at about the time you took the pumps apart she was three feet down by the head?

A. Between three and four feet, I should say.

Q. Was that due to water in her bow?

A. We were discharging cargo at the time.

Q. It was due to having to discharge cargo astern——

A. Yes.

Q. And she had some water in her bow that you wanted to pump out?

A. Yes, sir.

Q. Was it in connection with that pumping that you took the pumps apart?

A. Not in connection with that, any more than to overhaul them to see what condition they were in.

Q. Did you take them apart before or after you did this pumping?

A. It was before.

Q. I understand it was the wrecking pump that you took apart?

A. Yes.

Q. I understand that both the steam pumps on this vessel were connected with the shaft of the winch—is that right?

A. Both the deck pumps were.

230 Q. I am referring to the wrecking pump and the messenger pump—they both worked from the shaft of the winch?

A. They work separate or together.

Q. Each of them got its power from the shaft of the winch, isn't that so?

A. Not directly.

Q. Well, what was it that ran the wrecking pump?

A. The steam gear.

Q. Didn't the wrecking pump run from a cog wheel on the shaft of the winch?

A. Yes.

Q. Didn't the messenger pump run from a chain or rope?

A. A chain messenger.

Q. This chain messenger ran from the shaft of the winch to the wheel on the pump—is that correct?

A. Yes.

Q. Have you ever sailed as an engineer?

A. No, sir, that isn't my profession.

Q. Have you ever acted as an engineer on shore?

A. No, sir.

Q. You are not an expert on pumps and machinery, are you?

A. Well, what we use on board a vessel.

Q. You mean one has to come in contact with them as a captain of vessels?

A. Yes, we have to do that always.

Q. You never had had occasion to do any considerable amount of pumping on the Olcott, did you?

A. No, sir.

Q. All you had to do was to clear the vessel of a little bilge water the same as collects on any vessel?

A. All the pumping we did was what pumping was necessary.

Q. And that I understand was very little?

A. That was very little. When in smooth water or in the harbor she was practically what is called a tight vessel. At sea, like all other vessels, she would make more or less water.

231 Q. That would be a few inches in the course of a day?

A. Yes, sir.

Q. Or even less than that?

A. Well, you couldn't get less than a few inches.

Q. Would she leak two or three inches a day at sea?

A. At sea it would depend on the weather. In smooth water she wouldn't make over an inch—just enough to catch the pumps. When it would be rough weather and more or less water around the decks and around her bowsprit, like all other vessels—there would be maybe five minutes' work—

Q. You mean five minutes' work with the pumps?

A. Yes.

Q. You didn't have occasion at any time to take the messenger pump apart, did you?

A. No, sir; they were in working condition as we used them the same time.

Q. When you did any pumping out of the vessel you used both steam pumps ordinarily?

A. Yes.

Q. You simply started the winch and let both pumps work?

A. No—we used the steam pump in the engine room—at the time I was speaking of in the docks here we used that, and then drained her out with the other pumps afterwards.

Q. If both these steam pumps were in working order they would take out a couple of feet of water an hour?

A. Yes—they ought to take out more.

Q. You are speaking now of their capacity as you judge it by seeing them?

A. Yes.

Q. That is, two pumps of that capacity you know from experience would take out that amount of water?

A. Yes, or more.

Q. You never had occasion to actually test these two pumps in that way did you?

A. Not to their full capacity.

232 Q. All you ever had to do was the little pumping you have told us about?

A. Yes.

Q. When you took this wrecking pump apart, just tell us as nearly as you can what you did?

A. Well, the engineer did the work there. I was only in there when he was overhauling it and looking them over. The engineer has been in the vessel six years.

Q. In that same vessel?

A. Yes.

Q. You don't know in detail just what he did—you only know that he was in there taking the pump apart and putting it together again and getting ready to do some pumping?

A. And the pump was in good condition when he got through. I know he put new springs in the pump and what packing he needed. Just exactly what was done I don't know now; I have seen too many pumps since.

Q. But what was done was actually done by the engineer?

A. Yes, and I seen and know it was done.

Q. You know when he got done you used the pump to pump the water out of the bow?

A. Yes.

Q. That is about all you know about it Captain?

A. I know I was there when it was done.

By Mr. Goodrich:

Q. Did you help?

A. Yes, sir, I helped—what help was needed in overhauling it.

By Mr. Englar:

Q. I understand from what you have said that you personally didn't do it?

A. We don't do anything more than we can help on board of a vessel if we have anybody else to do it.

Q. And you had the engineer there and he overhauled this pump and you were there and you saw him overhaul it—is that so?

A. Yes, that is it exactly.

Q. When he got through you had some pumping to do and you did it with that pump; that is a fair statement of your connection with the matter, isn't it?

A. That has been the whole statement, I think, all through.

Q. I suppose the Edith Olcott in the condition in which you sailed in her if she had been left alone and had not been pumped out, she would gradually have accumulated a good deal of water in her in bad weather?

A. Not to the extent of six feet.

Q. That would be only a matter of time, wouldn't it, Captain?

A. Not in two weeks, the time she was out.

Q. If you had a combination of bad weather and no pumping it would simply depend on how bad the weather was?

A. Certainly.

Q. If you had bad weather and didn't pump her she might get several feet of water in her in the course of several days?

A. Naturally.

Q. On the other hand, in the weather you had you kept her pumped out with a few minutes' pumping each day?

A. Each four hours; in bad weather at sea the pumps are always attended to every four hours; in good weather generally night and morning, if she isn't accustomed to making much water.

Q. You never had occasion to run these pumps, either one of them, more than a few minutes at a time, did you, at sea?

A. No, sir, not over 10 minutes at any one time in every four hours.

Q. Not more than 10 minutes at any one time, even in port?

A. The time we used them then I think the pumps were used 15 minutes.

234 Q. That was the longest you ever ran them at one time?

A. Yes.

Q. That was in port on the occasion you have told us about?

A. Yes.

Q. After you got back from your trip?

A. Yes, after we got back from the trip.

By Mr. Goodrich:

Q. How long had she been without pumping at that time?

A. Since we had been in port about a week.

By Mr. Englar:

Q. That was in the port of New York?

A. Yes.

Q. How much water did she have in her on that occasion?

A. I couldn't tell you. On an even keel I suppose she would have about a foot.

Q. But being down by the bow was it more at the bow than at the stern?

A. Yes. The pumps on an average take the water out down to about 8 inches.

Q. That is even after the vessel is pumped out there is about 8 inches at the keel?

A. Yes, on an even keel. One end down there wouldn't be any in the other end.

Q. The captain of a vessel doesn't ordinarily have much to do with the pumps, does he, as long as they are working all right, or the vessel is kept free of water?

A. No, as long as he has an engineer who is competent, but some of the sailing vessels don't carry licensed engineers, so the captain has to perform the duties when they get in any trouble.

Q. But as long as everything goes right he isn't bothered?

A. No, sir, as long as everything goes right he isn't bothered.

235 Q. The engineer attends to it?

A. Yes, sir, the engineer attends to it.

Q. Just why was it that you and the engineer overhauled this wrecking pump when you did?

A. It was a new vessel to the company and myself and I wanted to see what condition she was in.

Q. You had some pumping to do at that time, didn't you?

A. Yes, this was a good chance to try them and see them tried.

Q. And it was with that pumping in view that you had the pump overhauled?

A. I had a chance to see whether it worked all right. At other times the engineer would pump her out and I wouldn't be there or notice it.

By Mr. Goodrich:

Q. Did you expect to go in her the next trip, the trip on which she carried railroad iron?

A. Yes.

Q. Is that a pretty hard cargo to carry?

A. It is supplied to rd

A. It is supposed to be the hardest kind on a wooden vessel.

Q. Was it partly for that reason that you overhauled the pump?

A. It was partly for every reason. It is the custom to do it.

Q. As to the three pumps forward, the two messenger pumps and the wrecking pump, which sucks to the lowest point?

A. The messenger pumps.

Q. And the other pump is somewhat shorter in its pipe?

A. It don't go down so far and then it has a larger pipe and sucks quicker.

Q. What is the practice at sea in ordinary weather as to sounding,

and how is the sounding done to determine the presence or absence of water in the vessel?

A. In the majority of vessels there is a pipe runs down in the hold for that purpose.

236 Q. Where is that pipe situated?

A. It is usually in the cabin, down through the cabin floor.

Q. How big a pipe is it?

A. Just an ordinary inch pipe.

Q. How is the sounding done?

A. With an iron rod and a rope at the end of it.

Q. And the iron end of it goes down——

A. To the bottom.

Q. How far down does that pipe go—how near the skin of the vessel?

A. It generally goes to within three or four inches—enough to allow the water to come up in it.

Q. And you tell the amount of water in the vessel by the wet place on the sounding rod?

A. Yes, sir.

Q. How often is that done?

A. In bad weather we usually do it every four hours—every time we change the watch; in ordinary weather every morning and night. If the vessel isn't accustomed to making much water it is the mate's and engineer's duty.

Q. Whose duty do you say that is?

A. When we carry an engineer it is usually his duty—he is supposed to look out for the amount of water in the vessel.

Q. Where was the sounding pipe in the Olcott?

A. In the cabin, but I don't remember now whether it was in the forward end of the cabin or the after end.

Q. Do you mean in the cabin aft?

A. Yes.

Q. Have you ever seen a vessel with a sounding pipe in the cabin?

A. Yes, I have seen it in the after cabin.

Q. The cabin in the Edith Olcott was aft on the vessel, was it?

A. Yes, but I mean the cabin is divided in two parts at the amidships bulkhead.

237 Q. That goes right across the cabin, does it?

A. Yes.

Q. And the forward part of it you call the forward cabin and the aft part you call the aft cabin?

A. Yes.

Q. But it is all in the same house?

A. All in the same house, yes.

By Mr. Englar:

Q. You usually overhaul the pumps before you start out on any trip with the schooner?

A. Always, yes, it is the custom. If you have an engineer that you can depend on you take his word for it.

Q. But if you are not satisfied that he has done it you do it yourself?

A. You see that it is done.

(Signing waived.)

238 *Deposition of Joseph O'Toole.*

United States District Court, Southern District of New York.

BENNER LINE
against
FIELDS S. PENDLETON.

Before John B. McCarthy, Esq., Notary Public.

NEW YORK, December 19, 1912.

Deposition of Witness on Behalf of Respondent Taken by Consent at the Office of John B. McCarthy, Notary Public, No. 49 Wall Street, New York City, This 19th Day of December, 1912.

It is consented that the testimony may be taken by a stenographer, whose fees shall be taxable disbursement; signing and filing of deposition waived; copy to be furnished to libellant's proctor.

Appearances:

Mr. Englar, for Libellant;

Mr. Goodrich, for Respondent.

JOSEPH O'TOOLE, being duly sworn, as a witness on behalf of respondent, testifies as follows:

Examined by Mr. Goodrich:

Q. How old are you, Mr. Toole?

A. I am 42 years old.

Q. How long have you followed the sea?

A. I have followed the sea since 1895.

Q. What papers do you hold?

A. I hold a master's license in sailing vessels.

Q. How long have you had it?

239 A. I think I have had it for about 3 years, but I won't say positively.

Q. Did you know the schooner Edith Olcott?

A. Yes, sir, I did.

Q. Did you ever sail in her?

A. Oh, yes, I sailed in her.

Q. In what capacity?

A. As mate.

Q. From what time to what time?

A. I joined her I think in September—I can't tell you the exact dates—

Q. What year?

A. I know it was early in the fall of 1907.

Q. And you left her when?

A. I left her in the middle of April, 1910—somewhere around there it was.

Q. Where did you go from her?

A. I went into the Mount Hope.

Q. To whom does she belong?

A. She belongs to Fendleton Bros.

Q. Are you in her still?

A. No, sir.

Q. Where did you go from the Mount Hope?

A. From the Mount Hope I went into the Scotia.

Q. To whom did she belong?

A. She belongs to Fendleton Bros.

Q. Are you in the Scotia now?

A. No, sir.

Q. What vessel did you go in from the Scotia?

A. I went as mate in the Zachary Sherman.

Q. Are you in her now?

A. No, sir.

Q. From the Zachary Sherman where did you go?

A. Into the Blanche H. King.

Q. Who owned the Sherman?

A. Benedict, Manson & Co.

Q. Who owned the Blanche King?

A. Fendleton Bros.

Q. Are you in her now?

A. Yes.

249 Q. When do you expect to sail?

A. I am going just as soon as I can get away.

Q. Does that mean to-morrow, if possible?

A. Yes, sir, to-morrow, if possible.

Q. Returning to the Edith Abbott, after you joined her was she dry-docked?

A. Yes, she came over here, we went from Portland down to Newport News, I think, and from there to Boston, and then came around here and went over to Tietjen & Lang's drydock and they hauled her out there and painted her bottom and caulked every seam in her from her keel up.

Q. Were other repairs made to her?

A. Yes, sir; there was quite a lot of repairs made to her at that time.

Q. What was her condition after the completion of those repairs?

A. She was in A-1 condition.

Q. What was the date of those repairs?

A. I couldn't tell you because I don't know nothing about it—I have no log book, you know, and I can't tell about that date—but it was in the fall of 1907; when those repairs were made it was cold weather, I know—there was snow on the ground, I remember that.

Q. It was within 3 or 4 months after you joined the vessel?

A. Yes, within 3 or 4 months after I joined the vessel.

Q. During the two years and a half that you were in the vessel what have you to say about her as a seaworthy ship?

A. Well, Mr. Goodrich, I think she was the best vessel that I ever put my foot aboard of. I never seen nothing to complain of; no matter what the weather was she was always just the same.

Q. What about her outfit?

A. There was no vessel on this coast that I was ever in that
241 had the outfit that vessel had. The owner and the captain were the most particular men in the world and they always had a lot of stuff in the vessel—

Q. Will you tell us more particularly about her pumps—what was their condition?

A. When I left her they were all O. K.—every one of them.

Q. Had you any trouble with any of the pumps while you were on board of the vessel?

A. I had trouble with one of them. I was in port and nobody was on board the vessel but the engineer and me, and I hoisted that hand-pump out and we found a lot of dirt had accumulated in the pipe that goes down through the ceiling,—the pipe—it was a little too close to the bottom of the vessel and we sawed off a little piece about the size of that match box there (indicating).

Q. About 3 or 4 inches would you say?

A. Yes, I should say about that.

Q. How near to the bottom was the pipe before you sawed it off?

A. I should say about 3 or 4 inches. I could just shove the edge of my hand under it.

Q. So after you cut off the end the bottom of the pipe was 6 or 7 inches from the bottom?

A. Yes, sir.

Q. After that did you have any trouble with it?

A. No, sir; after that we had no trouble with it at all.

Q. What have you to say about the vessel leaking in rough weather?

A. She didn't leak any more in rough weather than she did in smooth weather.

Q. How about her leaking in smooth weather?

A. I called her tight. Of course she leaked a little bit.

Q. Did she leak any more than vessels usually do?

242 A. No, sir, not as much as vessels usually do.

Q. And what sort of a vessel was she in heavy weather?

A. In heavy weather she was a very nice sea boat—she was a good sea boat.

Q. In January, 1910, you were at Perth Amboy, were you not?

A. Yes.

Q. Were any repairs or overhauling done to the vessel at that time?

A. Yes.

Q. State what was done?

A. We went into Perth Amboy and I think we had a new topmast

put in her and new trestle trees and crosstrees on the spanker. She was searched all over at that time.

Q. Was there any caulking done at that time?

A. She was only just searched—that is all. She didn't need it. We used to haul her out about twice every year. He took good care of that vessel.

Q. In searching her in January, 1910, was she found to be tight or leaking?

A. No, she was tight, but she was searched on deck and there was a little break around one of her masts where it wasn't driven down and the mastcoating got off.

Q. Was she repaired at that point, do you know?

A. Yes, sir, she was.

Q. What did that consist of?

A. They had to put in some new wedges and they put some beams in. I think they fixed 2 or 3 beams down in the between-decks.

Q. What about the pumps—was anything done to them at the time?

A. Yes.

Q. What was done at that time?

A. They were thoroughly overhauled and the steam-gear also. I had to overhaul the hand pumps.

Q. What did the overhauling consist of?

243 Mr. Englar: We object to his testifying to anything unless it is something of which he has personal knowledge.

Q. Confine yourself to what you know.

A. Why I have done so.

Q. Now in January, 1910, what did the overhauling of the pumps consist of—what did you do to them?

A. Well, we fixed them all up. There is a big wrecking pump in the engine room. They took that all apart and where it wasn't all right they put in new material, all new fittings, and the engine, boiler, etc.—they overhauled that engine room thoroughly and these pumps, and we put new packing in the pumps. They had two hand pumps run by steam right aft of the forward house outside on the deck. We overhauled them thoroughly, I know.

Q. Was there much new material needed?

A. No, sir, there wasn't. In the engine room I think there was some new springs put in.

Q. Valve springs?

A. Yes.

Q. Is that the only new material that was needed?

A. Yes, I am almost positive that was the only new material that was needed.

Q. When that overhauling was finished what was the condition of her pumps?

A. Their condition was A-1.

Q. What was the condition of the vessel's outfit and supplies as to packing?

Mr. Englar: I object to that as immaterial, incompetent and irrelevant as affecting this suit.

A. She had more than the average, a great deal more.

Mr. Englar: I move to strike out the answer on the grounds previously stated.

244 Q. In what trade was the vessel engaged while you were in her?

A. She was engaged in the coastwise trade.

Q. Did you often go around Hatteras?

A. Yes, sir, several times.

Q. That is a place where you encounter pretty heavy weather, isn't it?

A. Yes, it most always is.

Q. How did the vessel behave there?

A. She behaved all right.

Q. Did she leak any?

A. No, sir, no more than the ordinary vessel.

Q. You have spoken of the pumps; will you describe what pumps there were on the Edith Olcott while you were in her?

A. There was one of them—a big 6 or 7-inch—I don't know which now—of course I wasn't the engineer—a pump, a wrecking pump, I didn't measure it, a Hyde wrecking pump, and then there was——

Q. Was that a double pump or a single pump?

A. That was a double pump. We call them coffee mills on board the vessel; one goes up and the other down—two plungers, one on each side.

Q. How many pipes did she have?

A. One pipe.

Q. But double acting?

A. Yes.

Q. What else in the way of pumps?

A. There was another Worthington 3-inch pump that was connected with the hold. We used to use it to wash the deck. Outside of the door there was two of these hand pumps, that is, formerly they were hand pumps but they ran a messenger chain and ran them by steam. Then there was two hand pumps in the after end of the vessel worked by hand.

Q. All except the last two pumps were forward and in or near the engine house?

A. Yes.

245 Q. Now where were the two after hand pumps situated?

A. Just forward of the after house.

Q. One on each side of the keelson?

A. Yes, one on each side of the keelson.

Q. And were they amidships on the vessel?

A. Yes, they were both amidships.

Q. How did the Olcott's outfit of pumps compare with other vessels that you have been in?

A. Well, I think she has got one more pump than any other vessel I have ever been in. Most of them have one pump, and as a general thing vessels built nowadays don't carry these hand pumps—they carry only steam pumps—one or two.

Cross-examined by Mr. Englar:

Q. You say the Olcott didn't leak?

A. No, sir, she didn't.

Q. You never had much occasion to do much pumping on her, that is, you never had to pump much water out of her?

A. No, sir, nothing alarming—no; we had to pump her once in a while, of course, just to take the water out to prevent it coming up to damage the lumber.

Q. Any vessel will leak more or less, isn't that so?

A. I never seen one that wouldn't leak some.

Q. These steam pumps that you have described on the Olcott work from a winch, don't they?

A. Yes, they work from the engine.

Q. That is to say, you run the engine and that turns the winch and then by messengers from the winch you run the pumps?

A. Yes. One of these pumps, the big pump, ran direct from the engine.

Q. It ran by a cog wheel, do you mean?

A. Yes.

246 Q. You say that nowadays vessels, new vessels, only carry steam pumps?

A. Yes; on a vessel of her size they don't put any hand pumps in.

Q. The pumps they put in vessels built now, they are pumps where you just turn the steam into the pump—isn't that the case?

A. Yes; that is the kind of pumps that they have now—Worthington pumps they call them.

Q. You simply run steam into the pump and the pump is a combination of engine and pump—is that it?

A. Yes.

Q. Who actually overhauled the pumps at the time referred to?

A. I did, and the engineer. Of course I didn't do a great deal myself, but I was bossing the job.

Q. Were you bossing the engineer?

A. I had to look after the pumps. I was in charge of the vessel, you know. There was nobody on board the vessel except the engineer and me.

Q. He actually did the work, did he?

A. Well, he did the most of it.

Q. Were you present all the time?

A. Yes, I was present all the time, because if I wasn't there he wouldn't do anything. He weighed about 250 and he used to like to lay down.

Q. If a vessel gets waterlogged she will strain much worse than when in ordinary condition, will she?

A. Well, I should think she would. I never was in one.

Q. That would naturally be the case?

A. Well, I don't know, but it looks that way to me.

(Signing waived.)

247

Deposition of Montgomery L. Snodgrass.

United States District Court, Southern District of New York.

BENNER LINE

VS.

FIELDS S. PENDLETON.

Before John B. McCarthy, Notary Public.

NEW YORK, March 13, 1913.

Deposition of Montgomery L. Snodgrass, Taken Before John B. McCarthy, Esq., Notary Public, at His Office, 49 Wall Street, New York City, This 13th Day of March, 1913, by Consent, as Heretofore.

Appearances:

Mr. Englar for the Benner Line;

Mr. Goodrich for Pendleton.

MONTGOMERY L. SNODGRASS, being duly sworn, as a witness on behalf of respondent, testifies as follows:

Examined by Mr. Goodrich:

Q. What is your business?

A. Going to sea as mate of a vessel.

Q. How long have you been going to sea?

A. I have been going to sea about thirty-five years now.

Q. What certificates do you hold?

A. I hold both mate and master's certificates.

Q. How long have you had a master's certificate?

A. I have had it ever since 1899.

Q. How long have you known Mr. Fields S. Pendleton?

248 A. Since yesterday,—I guess about half past two or three o'clock.

Q. Have you ever seen him before?

A. Never in my life.

Q. Have you ever sailed for him before?

A. One time in this vessel.

Q. The schooner Edith Olcott, do you mean?

A. Yes, sir, the schooner Edith Olcott.

Q. Do you know the firm of Pendleton Brothers aside from Mr. Fields S. Pendleton?

A. No, sir, I don't.

Q. Have you been in the Edith Olcott?

A. Yes, sir.

Q. When and where did you join her?

A. I joined the Edith Olcott in the last part of May.

Q. Where?

A. In Jacksonville, Florida.

Q. What year?

A. Well, it will be two years in June—three years.

Q. Three years next June, do you mean?

A. Yes, three years next June.

Q. 1910?

A. Yes, sir.

Q. Was she light or loaded when you joined her?

A. She was light when I joined her.

Q. What cargo did you load in her?

A. Railroad ties—cross ties.

Q. To be delivered where?

A. At the Lehigh Valley Railroad Company dock, in Perth Amboy, New Jersey.

Q. When you joined the vessel did you look her over?

A. I certainly did, yes, sir.

Q. What did you do in the way of looking her over?

A. First I went to have a look at her chains and anchors and went to sounding—had a look at her pumps—looked her all over—went down below and found the after part of one pump in unloading railroad ties they had knocked off a few boards of the
249 pump box and I replaced them,—the pipes,—everything appeared to be very good.

Q. What pumps did she have?

A. She had two hand pumps aft, a steam pump in the engine room and two steam pumps set just outside of the engine house.

Q. By what were the pumps forward worked?

A. They were worked by steam.

Q. Where was the boiler?

A. The boiler set in the forward part of the forward house.

Q. Did you have occasion at any time to try or to see tried the pumps?

A. Yes.

Q. Tell us what you saw?

A. Every watch I saw them tried—I saw them try them—that is, every four hours.

Q. How were they working?

A. They worked all right, sir; they worked nicely.

Q. Did you have occasion to use the steam pumps at all?

A. Well, very little.

Q. When?

A. Well, we used them on two occasions; when we had a heavy northeaster coming up two nights we used them, probably not over ten minutes pumping.

Q. Did you have occasion to use them after she arrived?

A. No, sir, only when the vessel was unloading aft and tipped a little by the head, you know.

Q. Then she was low by the head, was she?

A. Yes, sir.

Q. Did you use the steam pumps then?

A. Yes, sir, we did.

Q. Were they working all right?

A. Yes, sir, fine. They worked nicely.

Q. What have you to say as to her equipment, stores and so on?

A. I couldn't say anything too strong; she was as nice a
250 fitted out vessel as ever I was mate of myself.

Q. What was her general construction as to seaworthiness?

A. Nothing the matter with her? She was capable of going anywhere.

Q. What weather did you have on the way up?

A. Two heavy breezes, one from the southwest and one from the northeast.

Q. How far did you carry your southwest wind?

A. To Romain Light, nearly off Charleston Bar, about west northwest, something like that—then the wind came down from the northeast and we had quite a heavy northeaster for about five days.

Q. In what condition did you deliver your cargo?

A. Just as good as ever if I am able to judge. There were no ties strained, lost or wet.

Q. Where did you have your cargo, below?

A. Below, all over the hold and on deck.

Q. How heavy a deck load did you have?

A. We had quite a load of ties—I disremember exactly how many thousand she had—I heard them say that it was one of the largest cargoes she has ever been known to carry.

Q. Was it flush with the rail or above it?

A. A little above the rail, about one tie above the rail.

Q. What have you to say as to the equipment of this vessel compared with other vessels in the matter of pumps?

A. Well, as far as I am able to judge she is a vessel fitted out in my estimation, better, with more pumps than the average vessel.

Q. In what particular?

A. In the first place in the average vessel you will find one steam pump in the engine room and a couple of hand pumps aft but this one had one in the engine room and two setting outside and two hand pumps aft.

251 Cross-examined by Mr. Englar:

Q. In what capacity did you join the Edith Olcott?

A. As mate.

Q. What vessel had you been on before you joined her?

A. I left the schooner Agnes Manning.

Q. At Jacksonville?

A. At—yes, at Jacksonville, Florida.

Q. And after you left the Olcott what vessel did you go on?

A. I really don't think I could tell you right away.

Q. What kind of weather did you have on the trip down on the Agnes Manning?

A. Well, we had quite heavy weather. We had very heavy south-easters and southwesterers all the way down to Jacksonville. The vessel was leaking considerable and that is the reason I left her in Jacksonville. I was on one of Mr. Birdsall's vessels here. I left her in Jacksonville.

Q. I understand that this is the first time or yesterday was the first time that you have ever had occasion to refresh your recollection about your trip on the Edith Olcott—is that right?

A. Yes, sir.

Q. And can you remember just what pumping you did on a vessel three years ago?

A. Well, I can form a very good idea because I tell you in this line of business if you have too much pumping in one vessel you come pretty near giving her a wide berth the next time you are asked to go in her.

Q. Did you have much pumping to do in the Edith Olcott?

A. We didn't, no, sir.

Q. Do I understand that you examined the pipes of the pumps on the Olcott?

A. Yes, sir, as far as I could see them, without knocking the pump box apart. I didn't knock the pump box apart, but apparently from what I could see the pipes looked good and sound to me.

Q. What pumps are you speaking of?

A. The after pumps, the amidship pumps, the outside forward pumps.

Q. The steam pumps?

A. Yes, sir, the steam pumps. They had knocked a few boards off in dragging the iron out.

Q. How about the hand pumps?

A. They were the ones I put the box on. These I worked by hand at Perth Amboy. If there was any flaws in the pipes you couldn't pump water out of them by hand.

Q. How much water do you suppose you had in her at any time when you were in her?

A. I don't think at any time she had eighteen inches of water in her.

Q. How much water would the pumps catch in her?

A. Well the big steam wrecking pump in the forward house would catch at four or five inches.

Q. How about the hand pumps?

A. They would catch at four inches.

Q. Of course, when you speak of her having 18 inches in that wouldn't be all over her?

A. No, that would be just under the pumps. You know 18 inches all over a vessel is a large amount of water.

Q. So that what you had to pump was the ordinary bilge water that would collect in any vessel?

A. That is all—not a particle more,—not beginning to be as much as the average vessel would make.

Q. You could be positive, can you, that this was in 1910 that you joined her?

A. Yes, sir.

Q. Who was master of her at that time?

A. A man named Bill Fletcher—Capt. William Fletcher.

253 Redirect by Mr. Goodrich:

Q. What have you to say as to the condition of the vessel as to her seams or ways around her hawser pipes?

A. Well, I found them all tight.

Q. All butts tight?

A. Yes, sir.

Q. Around her ports?

A. I found them tight.

Q. What have you to say about Capt. Fletcher as a mariner?

A. Well, I can say this, that in all my going to sea I have never been with a more capable, competent man than he is,—a thorough seaman, a thoroughly practical navigator and a good, entirely collected master of a vessel.

Recross by Mr. Englar:

Q. What vessel are you on now?

A. I am not on any vessel at present but I am expecting to go on the schooner Josephine that belongs to Baltimore.

Q. What was the last vessel you were in?

A. The Eaglewind, Capt. Morgan.

Q. When did you leave her?

A. Not quite 5 weeks ago.

Q. At New York?

A. No, sir, at Perth Amboy. Since that time I have been working in a rigging loft at Perth Amboy.

By Mr. Goodrich:

Q. When you left the Edith Olcott where was she?

A. At the Perth Amboy dry docks.

Q. Did you help put her in the dry dock?

A. I helped put her alongside the dry dock, not in the dry dock.

Q. You left her before she went in, did you?

A. Yes, sir, I left her before she went in.

Q. Who were on board at that time?

A. Capt. Fletcher and the cook on the night I left.

(Signing waived.)

254

Deposition of George Ferguson Wright.

United States District Court, Southern District of New York.

BENNER LINE
against
FIELDS S. PENDLETON and Ano.

Before John B. McCarthy, Esq., Notary Public.

Deposition of Witness on Behalf of Respondent, Taken by Consent at the Office of John B. McCarthy, Esq., Notary Public, 49 Wall Street, New York City, This First Day of May, 1913, under the Same Stipulation as Heretofore.

Present:

Messrs. Harrington, Bigham and Englar (Mr. Englar) for libellant;

Mr. Goodrich, for respondent.

GEORGE FERGUSON WRIGHT, being duly sworn as a witness on behalf of respondent, testifies as follows:

Examined by Mr. Goodrich:

Q. How old are you?

A. I was fifty-four last March.

Q. How long have you followed the sea?

A. I have followed the sea off and on ever since I was eleven years old.

Q. In what capacity?

A. Well, most anything on board of a ship.

Q. Have you ever been master?

A. I have of a barge, but not of a sailing vessel.

Q. Have you been mate?

255 A. I have been mate, second mate, engineer, anything else—any position on board of a ship.

Q. Have you also worked ashore as engineer or machinist?

A. Lots of times, yes, sir.

Q. Where?

A. In one place the Rhode Island Locomotive Works, the Bath Iron Works, the Fore River Shipbuilding Company and different places in Providence in machine shops and one thing and another.

Q. Were you on board the Edith Olcott on the trip on which she was lost?

A. Yes, sir, I was.

Q. Do you remember what day you shipped—was it the day the vessel sailed?

A. The very same day she sailed, yes, sir.

Q. Was that Saturday, July 30th, 1910?

A. I couldn't tell you now about the dates but I think it was Saturday.

Q. What time did you first see the vessel?

A. Oh, I seen her loading three or four days before I shipped on her.

Q. Had you ever been on board of her before?

A. Oh, yes, years ago I was on board of her.

Q. Were you sailing on her?

A. I had been before the mast in her.

Q. You saw her then on the morning that you shipped and the day she sailed—where was she lying then?

A. Pier 10, I think it was.

Q. East River?

A. Yes, South Street.

Q. Did you go on board of her?

A. Well, I had an order to go aboard—I met Capt. Fletcher there and I says, "Do you want an engineer?" He said, "Yes—" He said, "Are you an engineer?" I says, "I have been with some of the best of them on the coast." He says, "Come right up and sign."

Q. Had you ever met Captain Fletcher before?

256 A. No, sir, he didn't know me but he had seen me in other vessels. He knew me better than I knew him.

Q. Did you go up and sign?

A. I went up and signed and went right back on board.

Q. Did you do any work before you went up and signed?

A. I helped caulk the fore hatch and when I came back I finished it.

Q. Why did you help to caulk the fore hatch?

A. Because there was nobody else to do it and there was some cargo that had to go right there.

Q. Where was that cargo to be stowed?

A. Right there at what they call the well,—between the break of the poop and the forward house.

Q. The break of the poop on the Edith Olcott extends pretty well forward?

A. Yes, there is a big hatch there, too.

Q. That is the hatch you speak of?

A. The forward hatch, yes.

Q. How long is that well fore and aft?

A. Well, I should judge 25 or 30 feet.

Q. And you worked part of the time on the hatch and then went up and signed, did you?

A. Part of the time, yes, sir.

Q. What time did you go back to the vessel?

A. Well, I wasn't gone more than twenty minutes.

Q. Then did you finish up the hatch?

A. Finished up the hatch, saw they got finished loading her at the forward house.

Q. Had you been into the engine house before you went to sign?

A. I went and examined everything before I started on the hatch.

Q. What was there in the engine room—what machinery and so on?

A. Well, there was a donkey boiler, Hyde engines, Hyde pumps,

circulating pump, one wrecking pump and my room and that is about all there was in the engine room.

257 Q. Was there a store room there?

A. My room was right there.

Q. Was there a store room separate from that where you kept your supplies?

A. No, sir, I had nothing to do with that at all. They were kept aft.

Q. What have you to say as to the equipment of the Edith Olcott in the matter of engine room supplies?

A. I had everything that a man could call for in the way of packing to fix pumps or engines with.

Q. Was there anything lacking?

A. Not that I know of, no, sir.

Q. Now, what did you do in the way of examining engines, boiler, pumps, etc.?

A. Well, the first thing I done when I went in the engine room I examined the boiler to see that the water supply was all right, then I stirred the fire up and got steam so I could turn these things over. I turned the engines over first and I found that they were working smooth enough and then I turned the pumps over.

Q. What did you find about the pumps?

A. Nothing whatever. They were in good order.

Q. Did you try the messenger pump?

A. Yes, sir.

Q. Where was the messenger pump?

A. The messenger pump was connected on the shaft of the engine with a chain and the messenger pump was right outside of the doors.

Q. Just aft of the bulkhead that forms the after part of the house?

A. Yes.

Q. Where was the messenger pump with reference to the foremast—was it forward or aft of the foremast?

A. Just after it because the foremast came down through the engine room.

258 Q. Was the messenger pump close to the bulkhead forming the after part of the engine room?

A. There was nothing but a frame there to hold the pumps.

Q. How careful an examination did you make of the pumps, and engine and boiler?

A. As far as anybody wanted.

Q. How long a time did you spend on it?

A. Oh, about 30 or 40 minutes,—something like that.

Q. And turned both pumps over, did you?

A. Yes, turned them all over.

Q. You saw that they were working all right?

A. Yes, I opened up the circulating pump and saw that was working all right.

Q. What was the type of pump in the engine room?

A. It was a Hyde pump.

Q. And what was the type of the messenger pump? Do you know the make of that?

A. Edison, I think—I wouldn't swear to that, though, but I think it was an Edison.

Q. What have you to say concerning the equipment of this vessel in the matter of pumps compared with other vessels on which you have been?

A. Well, I should say that she was in first class order when she left the wharf.

Q. I don't mean that—I mean as to the amount of pumps that she had on?

A. Well, she had plenty of them. She had a wrecking pump and she had the messenger pumps. Then she had plenty of hand pumps; she had two hand pumps, one aft and one forward.

Q. Do many vessels have as many as that?

A. Very few of them. Those that are built now days haven't got that; they only have the steam pumps.

Q. What was the capacity of the wrecking pump?

259 A. Well, on the Hyde there was two 5 inch pipes then but I couldn't tell you the capacity of the overflow.

Q. How many feet of water an hour do you think the wrecking pump would throw?

A. Wrecking pumps, take on a vessel that size, 20 inches an hour.

Q. What about the messenger pumps?

A. About the same capacity, running them at full speed.

Q. What have you to say as to condition of the dock, the coams, water-ways and so on?

A. In first class condition.

Q. Was there any water in her when you tried the pumps?

A. There was water in her when I tried the pumps.

Q. How long did you pump on her?

A. What do you mean,—after she started to leak?

Q. No,—while she was at the wharf.

A. I only just turned them over to see if they were in working order.

Q. Was there any water in her at that time?

A. No, sir; I just throwed a couple of buckets of water in to see if they were in working order.

Q. When you went to the vessel in the morning, who was on board?

A. There was Capt. Fletcher, and the mate and the cook.

Q. Did Capt. Fletcher go on the vessel on this trip?

A. No, sir, he didn't.

Q. Who was the captain that went in her on this trip?

A. Capt. Wallace.

Q. When did he join her?

A. About an hour before we sailed.

Q. Do you remember what time of day it was that you sailed?

A. Well, it was probably between two and three o'clock, I guess. We towed right to sea.

Q. Was the crew on board the vessel while you were at the wharf?

A. No, sir; they came aboard in the tow-boat.

Q. Did the tow-boat take you away from the wharf?

A. Yes, sir, the tow-boat took us away from the wharf. It was the same boat that brought the crew.

Q. Do you remember seeing a crowd of men coming down on the wharf just before you sailed?

A. Yes, sir.

Q. Did you recognize any of them?

A. I recognized two or three of them.

Q. Who were the two or three that you recognized?

A. Well, there is only one that I could call by name; that was Mike Sperry.

Q. Is that one or two names?

A. Michael Sperry. The other fellows I know them by sight all right enough but I couldn't call them by name.

Q. What was their business—what were they?

A. They were Union men.

Q. Sailorsmen, do you mean?

A. Yes, Union men, sailing men.

Q. Are you a Union man?

A. I am.

Q. Were you at that time?

A. I was.

Q. How long had you been so?

A. About 30 years I should say.

Q. Did Mike Sperry have anything to say to you?

A. Oh, yes, he had something to say to me.

Q. What did he say?

A. He asked me if I was going in that vessel for \$25 a month and I said, "No, I am going in her for \$30 a month." He said, "Oh, that is all right then." So he had nothing more to say to me.

Q. How long before the vessel's lines were cast off did the tug come?

A. Well, the cook and mate was taking the lines in when the tow-boat came.

Q. And who was casting them off?

A. I don't know.

Q. Did you hear any talk between Mike Sperry and those who were with him and the crew of the Fifth Street who were on the tug boat?

A. He didn't get a chance because they were on the other side of me—me!

Q. Was there any shouting or calling from Mike Sperry?

A. Oh, yes, and hock bats and everything else came around them.

Q. What was said?

Mr. Engler: Objected to as immaterial.

A. He called them a lot of damned words and things like that.

Mr. Engler: We move to strike out the answer.

Q. Was there any throwing of missiles?

A. There was a few stones came aboard.

Q. But you got away without any trouble, did you?

A. Yes, we got away all right.

Q. The 30th of July was Saturday; what sort of weather did you have on Sunday, Monday and Tuesday—do you remember?

A. Well, Saturday when we towed out by Sandy Hook here we got out as far as Barnegat and had to run back and anchor.

Q. Why?

A. Head wind and heavy breeze.

Q. Where did you anchor?

A. We anchored right off the Scotland Lightship.

Q. When did you get under way again?

A. We got under way the next morning.

Q. That was Sunday?

A. That was Sunday, yes.

202 Q. What sort of weather did you have after that Sunday?

A. The wind shifted around to the eastward and we put right to sea then and I didn't see no more land then until I came back.

Q. What was the weather the balance of that day?

A. Well, it was a light easterly breeze until along towards the middle of the night I think, when it struck in to the westward,—southward and westward again.

Q. When did you first get anything like bad weather, do you remember, remembering that Sunday was the 31st of July, Monday was the 1st of August, Tuesday was the 2nd of August and Wednesday was the 3rd of August—when did you get any bad weather?

A. Wednesday night we got the worst of it. We struck a gale of wind there and a heavy sea on the edge of the Gulf Stream.

Q. Did you have any heavy weather Tuesday night, do you remember?

A. Well, it was bad enough weather but I wouldn't call it heavy weather.

Q. Were you shipping any seas?

A. Yes; we were making a clean breach of it.

Q. On Tuesday night?

A. Tuesday night and Wednesday morning.

Q. Where was your room on the Olcott?

A. Right on the starboard side of the engine room.

Q. And what was your practice on that boat in the matter of keeping fires up?

A. I had my room right there so I could see the boilers night and day.

Q. Did you have steam on your boilers?

A. Yes, night and day.

Q. With banked fires?

A. A kind of a banked fire,—40 or 50 pounds of steam night and day.

203 Q. So that you were always ready to use your power?

A. Yes.

Q. Did you use your power for the sails?

A. Yes, that is what I was there for.

Q. You had winches on the end of the engine shaft on each side of the house, didn't you?

A. Yes.

Q. Were you up from time to time from the night of Tuesday the second of August?

A. About every hour or so, yes.

Q. For what purpose?

A. To look at my fires.

Q. Did anything happen during the night as to any blow or as to anything striking the vessel—anything that you know of?

A. There was some sort of a shock, but I couldn't tell you what it was.

Q. Do you know what time of night it was?

A. It was I should judge about twelve o'clock. I had a clock hanging up in the engine room.

Q. Did you say anything to anybody about it?

A. Only the mate. He came around about that time. I said to him—I asked him, "What struck her?" "Nothing as I know of," he said. He was walking by the house going to go up on the house to see if the look out was there. I said nothing that I know of.

Q. Did you turn in to bed again then?

A. Oh, yes, I did.

Q. You didn't think that anything had happened, did you?

A. No, sir.

Q. What did it seem like?

A. It just seemed like a slight shock—something more like a push than a shock.

Q. Now when was it that you discovered that the vessel was making water?

A. The next morning.

Q. At what time?

A. Right after breakfast.

264 Q. What time did you have breakfast?

A. At 7 bells—half past seven.

Q. Is there a sounding pipe in the cabin?

A. Yes, right under the table, right where I sat.

Q. Where did you have to sound that?

A. I had a rod there on to a piece of rope. The rod was probably 2 feet to 2½ feet, marked off in inches.

Q. Had you finished your breakfast when you sounded?

A. Yes, sir, just as soon as I finished I used to sound her.

Q. Had you been doing that night and morning?

A. Yes, sir, I had been doing that night and morning.

Q. Every morning and night since you left port?

A. Yes, sir, as a regular thing.

Q. What did you find Wednesday morning?

A. A little over three feet of water.

Q. Who was in the cabin at the time?

A. The captain, the mate and me and the steward.

Q. What did you say to anybody?

A. Well, I don't like to say it here. I say, "J— C— there is water in this vessel." I went forward and started the steam pumps.

Q. How long did it take you to get your steam pumps going?

A. Well, anywhere from 5 to 8 or 10 minutes.

Q. Now, should you say this was before or after 8 o'clock in the morning?

A. Just about 8 o'clock I should say.

Q. After you got your steam pumps going what did you then do?

A. I went aft and got the hand pumps ready and got them working and I found she was gaining water and by the time I come forward there was three of the cogs out of the Hyde pump that had broken.

265 Q. Were these cogs——

A. There was one wheel on the shaft and one on the pump.

Q. Were the cogs broken from the shaft or from the cog wheel on the pump?

A. On the pump.

Q. What was the diameter of the shaft of the engine?

A. About $2\frac{1}{2}$ inches.

Q. And how deep were the cogs,—that is, how much did they project beyond the shaft?

A. About probably an inch and a quarter or something like that I should say.

Q. How wide were the cogs?

A. They were three inches I guess.

Q. How big was the cog wheel on the pump?

A. About I should judge two feet in diameter.

Q. And what was its width as compared with the cogs on the shaft?

A. They were the same size. Both wheels were the same size.

Q. Now, had you examined that part of the machinery on Saturday before you sailed?

A. I examined everything thoroughly, yes, sir, because I wasn't going to Porto Rico on any fool's errand.

Q. What was the condition of things when you examined them?

A. As good as could be expected on board of a vessel of that class.

Q. What was your thought about Porto Rico, is that a difficult trip?

A. Well, the reason I examined the machinery so well was that out there I would have to hoist the cargo out and in an American port—of course, that is an American port now—but in these ports I would have to hoist the cargo out,—at Porto Rico I would have to hoist the cargo and use the circulating pump to save water. That

is the reason I was so particular about the engines and pumps and one thing and another.

266 Q. Well, when you got back to the engine room after seeing to the hand pumps aft, you say you found the three cogs were gone?

A. Yes, sir.

Q. And they were gone on the cog wheel of the pump?

A. Yes.

Q. Was the engine racing?

A. She was; she was making a terrible racket.

Q. What did you do?

A. The first thing I done was to connect the messenger pumps.

Q. How is that connection made?

A. There is a cog wheel on the shaft and another one outside on the pump and there is a messenger chain that went right around and these lugs took it on the lugs like that (illustrating). They were crank pumps.

Q. You started the messenger pumps going; how long after eight o'clock was that, do you think?

A. Oh, after I started the messenger pumps it was quite a while after eight o'clock.

Q. How long had it been—was it nine o'clock before you started the messenger?

A. Something like that I should say.

Q. Now, taking it for granted, that you left the vessel on Saturday morning—what morning was it you were taken off the Edith Olcott, do you remember?

A. I think the mate and three of the men and cook and two Porto Ricans we had there went on board Friday.

Q. Went on board what?

A. On this English steamer.

Q. The King Edgar?

A. Yes.

Q. When did you go?

A. I didn't go until pretty nearly 24 hours afterwards.

Q. Would that be Saturday morning, do you think?

A. That would probably be Saturday morning, but I couldn't swear to that.

267 Q. From the time that the messenger pumps commenced to work on the morning of Wednesday until you left the vessel yourself, was there any interruption of service of the messenger pumps?

A. Well, take it all together there wouldn't be 15 minutes' interruption.

Q. What was that occasioned by?

A. I had to pack one of them but I kept one running while I packed the other one.

Q. Was there a breaking of a chain?

A. We only took a couple of minutes to fix that.

Q. You had something to repair it ready at hand?

A. I had patent links and all I had to do was to put them in.

Q. Except for the interruption of packing and two or three minutes that it took to replace a link, was the service of the messenger pump continuous?

A. Yes, except for that the service of the messenger pumps was continuous.

Q. What was their efficiency—were they working well or not?

A. Well; they were working in good order.

Q. Where was the screen thrown?

A. Well, on the messenger pump the screen was thrown on deck.

Q. And ran out the scuppers?

A. Yes.

Q. Could you see the screen?

A. Yes, all I had to do was to look at the pumps to see if they were working or not.

Q. What have you to say as to how these pumps worked from the time they started until you left the vessel?

A. Well, I should say this,—that take it all through, they were in good order.

Q. Doing their work?

A. Doing their work, yes.

Q. When you left the vessel what did you do to the pumps?

268 A. Well, the last thing I done, before I left the vessel was to go in and open the furnace door and shut the pumps off.

Q. What have you to say about the weather during the interval between the morning of the third of August, Wednesday, and the time you left the vessel?

A. Well, I will tell you if you can understand me—probably you would understand me and you might not. The seas were making a continual breach right across her. It stoved in the engine room doors and washed everything out of my room.

Q. Was there any let up to it?

A. There was no let up then.

Q. From what direction was the storm coming?

A. From about south southwest.

Q. What was the vessel doing all this time?

A. Well, we hove her to when we found her leaking badly so as to make it easy.

Q. Did you yourself go below to make any examination?

A. Yes, sir, I went below half a dozen times. I was in the hold with the lantern.

Q. How did you go down?

A. I went down the fore peak hatch.

Q. How is that situated?

A. That is situated right down forward of the foremast there.

Q. Was there any difficulty about getting down?

A. No. There was a ladder down that way. I watched my chance. It was only a little hatch about three feet square.

Q. Is it under or on top of the forecandle deck?

A. It is under.

Q. So that you were sheltered from the seas that were washing over her?

A. Yes.

Q. What could you see when you got down there?

A. I tried the best I knew how to locate the leak but I couldn't find nothing.

269 Q. How freely could you move around down there?

A. Well, down forward there wasn't much room. I could climb over the cargo about as far as the main hatch.

Q. Did you ever get down as far as the keelson?

A. I was walking on the keelson for about 15 or 16 feet.

Q. At what part of the vessel was that?

A. That was at the forward part.

Q. Where with reference to the foremast?

A. Right down where the foremast goes down.

Q. Forward or aft of it?

A. Both.

Q. And there was clear space there so that you could go down?

A. Yes.

Q. How high above the ceiling were the top sides of the keelson?

A. Well, aboard of her there was about three feet and a half I guess.

Q. Were you at any time in water while you were walking in there?

A. The last time I was up to my waist in water when I was in there.

Q. Did you find any indications of where the water was coming in?

A. No, sir, I couldn't find any.

Q. How many times did you go down there?

A. Probably half a dozen times I should say.

Q. Did you ever see the master go down?

A. No, sir, I didn't.

Q. Or the mate?

A. No, sir.

Q. What have you to say as to the sleep you got between the morning of Wednesday and the time you left the boat?

A. I didn't get any.

Q. Were you continuously on duty?

A. I was continually on duty.

Q. Doing what?

A. Keeping the fire going and keeping the pumps running.

270 Q. Did the waves that came in ever get in your fires?

A. No, sir.

Q. Did you do anything to prevent that?

A. Yes, sir, I blockaded the doors and boarded them up.

Q. Did you do any bailing?

A. No, sir, I didn't do any bailing in the engine room although I was knee deep in water sometimes. You see there was such an incline from the furnace down to the big doors that it didn't get near my fire room at all.

Q. After you got back to New York did you see Mike Spervy again?

A. It was him that called my attention to it. I never thought no more about it—

Q. Did you see him again?

A. Yes.

Q. How many days after you got back should you think that was?

A. Probably three or four days—no, I see him the same day I got back because he was delegate of the Union then.

Q. Did he take you to an office at that time?

A. He did, yes, sir.

Q. What was your condition at that time as to sobriety?

A. Do you want to know?

Q. Yes.

A. I was "rum-done."

Q. What do you mean by that?

A. I had been drinking and nervous and wasn't capable—I didn't know exactly what I was saying, that is all.

Q. Were you drunk?

A. Partly, yes,—trying to get over it,—that is all.

Q. Did you go to somebody's office with him?

A. I went to an office but I couldn't tell you which street it was.

Q. What was the name of the man whose office it was?

A. Peterson.

Q. What happened there?

271 A. Well, as near as I can recollect, the first thing I knew I had a \$5 bill in my hand and I went out and got a couple more drinks.

Q. Did you sign anything while you were there?

A. I couldn't swear to that at all. I don't remember.

Q. Did they ask you some questions at the time?

A. Yes, sir.

Q. Who paid you the money?

A. There was a girl in the office there who gave me the money.

Q. What was she doing?

A. I don't know I am sure.

Q. A typewriter girl?

A. I suppose so.

Q. Do you remember whether you signed something?

A. I can't recollect whether I signed anything or not, but I know I made a statement of some sort.

Q. Did you afterwards get any more money from the same place?

A. Next morning I went up there again.

Q. How much money did you get at that time?

A. \$2.

Q. Did you ever get any more money from that place?

A. \$1.50 I think it was.

Q. When was that?

A. Two days after that.

Q. After you were in Peterson's office did you ship on another vessel?

A. Yes.

Q. What boat was that?

A. A schooner called the Fannie and Fay.

Q. Where did you go?

A. I went to a place called South Bristol, Maine, and from there to Stonington and loaded stone and then back to New York here.

Q. Stonington is in what state?

A. Maine.

Q. And then back to New York?

A. Yes.

272 Q. What vessel did you ship in after that?

A. Then I made a short trip in a schooner called the Irene Meserve.

Q. After your return from your trip from Stonington to New York did you go into Mr. Pendleton's office?

A. I went there voluntarily.

Q. Did you there make a statement?

A. Yes, sir.

Cross-examined by Mr. Englar:

Q. I understand you—if you have testified right—that on Wednesday morning right after breakfast you found $2\frac{1}{2}$ or 3 feet of water in the vessel?

A. Between 3 and 4 feet of water.

Q. You are positive of that, are you?

A. Yes, I am positive of that.

Q. You are not drunk now?

A. Willing to be.

Q. You are sober now, are you?

A. Oh, yes, I am sober now.

Q. And you know what you are testifying to?

A. Yes, and I will swear to everything I say.

Q. And you are just as positive as you can be that right after breakfast on Wednesday morning you found that water in the sounding pipe?

A. Yes, sir.

Q. The weather you had had up to that time had not been extraordinary?

A. Well, nothing was what I would call very bad but of course it was bad enough.

Q. But such as you have often seen along the coast?

A. Yes.

Q. And that applies to all the weather you had while you were in the vessel, doesn't it?

A. She was shipping heavy seas.

273 Q. But that was such weather as you have experienced along the coast many times?

A. Yes, sir, many times.

Q. Where were you last Monday of this week?

A. I was in Portland, Maine.

Q. And what brought you from Portland, Maine, to New York?

A. My own inclination.

Q. You just then decided to come from Portland to New York?—nobody had asked you to come?

A. No; I paid my own way.

Q. While you were there had you seen Mr. Fields S. Pendleton?

A. Let me see—which is Fields S. Pendleton? I don't know one from the other.

Q. I mean the gentleman who is here in the room now?

A. Yes; I seen him there.

Q. He didn't ask you to come to New York?

A. No, sir.

Q. Did you have any conversation with him at all?

A. Just a few words; that is all.

Q. Tell us what passed between you?

A. Nothing more than he asked me if I was going back aboard the vessel again.

Q. What vessel was that?

A. The one I am in now.

Q. What is she?

A. She is a three masted schooner.

Q. What is the name of her?

A. The Susie S. Davidson.

Q. Who owns her?

A. Mr. Pendleton.

Q. In what capacity are you on her?

A. Engineer.

Q. He asked you if you were going back on the vessel again?

A. Yes.

Q. That is all he said to you?

A. That is all the conversation there was between us.

274 Q. After that you decided that you would come to New York?

A. Yes.

Q. There wasn't anything he said that induced you to come to New York?

A. No, sir.

Q. He didn't even suggest your coming to New York?

A. No, sir.

Q. How long did you sign for on that vessel—

A. Let me see—I have been about 2 years and 5 months on board of her.

Q. You have been on board of her ever since this Edith Olcott disaster?

A. I have made a couple of short trips between that time. I was 2 years last November, so you can figure that up.

Q. In this same vessel?

A. Yes, in this same vessel I am in now.

Q. So that you went in her in November, 1910?

A. Yes.

Q. That was very shortly after you came off the Edith Olcott—is that right?

A. That is about right.

Q. And you have been on her continuously ever since?

A. Yes, sir.

Q. You are employed by Mr. Pendleton?

A. No, the captain of the vessel employs me.

Q. But the vessel is owned by Mr. Pendleton, isn't it?

A. Yes.

Q. That is Mr. Fields S. Pendleton who is here present in the room?

A. I don't know who owns her—I know who pays me. The Captain of the vessel pays me.

Q. You understand that she is owned by Mr. Pendleton, don't you?

A. I believe she is one of Mr. Pendleton's fleet.

Q. Who gave you permission to come down here to New York?

A. My own inclination.

275 Q. You just decided to leave the ship?

A. I decided to leave her but still I decided to go back in her.

Q. You are going back in her, are you?

A. Yes, I am going back in her.

Q. You didn't go to anybody and get permission to come to New York?

A. No, sir.

Q. You just left the vessel and came to New York?

A. Of my own accord.

Q. And you are going back on the vessel again?

A. Just as soon as I can see the vessel again.

By Mr. Goodrich:

Q. Where is the vessel?

A. I left her at 63rd Street, South Brooklyn. She is going to two or three places with a cargo of lumber. That is where I left her.

By Mr. Englar:

Q. When did you leave her?

A. About eight days ago.

Q. And you left her at Portland?

A. No, I left her here and went to Portland and come back again of my own accord.

Q. How did you go to Portland?

A. I went on the steamboat to Portland.

Q. What steamboat?

A. The North Star.

Q. What did you go to Portland for?

A. To see some of my old friends there. I used to work there.

Q. At the time that you left the vessel did you intend to join her at any special time?

A. Not at any time, but my clothes and everything are on board of her yet.

Q. You left your clothes on board, did you?

A. Yes.

Q. While in Portland you saw Mr. Pendleton?

A. I met him on the street.

276 Q. Whereabouts in Portland?

A. Well, I know the name of one street was Fore Street—if you have been in Portland you know where the custom house is there—that is the corner of Fore Street, the custom house is on Fore Street but I don't know the name of the other street that runs down by it.

Q. You simply met him accident-ly on the street?

A. Simply met him accident-ly on the street, yes.

Q. How long were you there with him?

A. Oh, probably three or four minutes.

Q. Just long enough for you to say what you have already told?

A. Just passed the time of day—something like that.

Q. You had no conversation about testifying in this case?

A. No, sir.

Q. Nor any talk about your coming to New York?

A. No, sir.

Q. And when you parted Mr. Pendleton didn't know whether you were going to New York or not?

A. Not as far as I know.

Q. He didn't say anything about your coming?

A. No, sir.

Q. You never have discussed that question with him at any time?

A. No, sir, not with Mr. Pendleton, no.

Q. Who told you to come up here today?

A. Oh, he found me today and brought me up here.

Q. Where did he find you?

A. He didn't exactly find me himself—I went up to the office myself because there is money coming to me yet.

Q. You went up to the office, you say, to collect your money?

A. Yes; there is where I found him.

Q. Did you get it?

A. Not yet. I have been sitting here all day.

277 Q. When do you expect to get it?

A. I can get it most any time, but not after office hours.

Q. How much is it?

A. I guess there is \$60 or \$70 coming to me yet. I haven't been paid on the last voyage yet.

Q. When you left to go to Portland did you quit this ship for good or not?

A. No, sir, I didn't quit her for good because I left everything on board.

Q. You intend to go back?

A. Yes.

Q. But you didn't make any arrangements about when you would go back?

A. No; I will probably be on board—go back when she gets unloaded and bound south again.

Q. Now, after coming from this trip on which the Edith Olcott

was lost you signed a protest along with the master and mate and some others, didn't you?

A. Yes, I believe I did.

Q. Did you know what was in it?

A. Yes, I know about what was in it.

Q. Well, were you sober when you signed it?

A. Certainly I was, yes.

Q. You knew what you were signing?

A. Yes, I knew what I was signing.

Q. Was it read to you?

A. It was read to me, yes.

Q. You knew what was in it?

A. I knew what was in it, yes and there was nothing more in it than I swore to today.

Q. Do you know whether there is anything in it about that shock you felt during the night?

A. No, there was nothing about that, I don't believe.

Q. You didn't think it worth while to make any mention of it?

A. No, because it was such a slight one that I didn't think of it.

Q. Do you know that the protest says, "That nothing
278 worthy of note occurred until August 3rd, and that at one

P. M. took in spanker and furl'd it, wind becoming squally sounded pumps and discovered vessel making water." That was after 1 P. M. You say now that is wrong?

A. That is wrong because it was right after breakfast.

Q. So that is a mistake in the protest?

A. Or I may be wrong and it may be right after dinner.

Q. You think now it may be right after dinner?

A. Yes, but I think it was right after breakfast.

Q. Do you know when it was?

A. Well, I will swear it was right after breakfast.

Q. So that the protest is mistaken?

A. Yes, because I know there was no water in her the night before.

Q. Now, the reason that you hove the vessel to was because she had this water in her?

A. Yes, she was leaking so bad we wanted to ease her up to see if it wouldn't stop her leaking.

Q. Now, there is nothing said in the protest about these cogs breaking off the pump wheel?

A. Not that I know of because I didn't think there would be any more to it.

Q. Do you swear that these pumps were throwing their full capacity of water?

A. Yes.

Q. And you will swear the same as to the hand pumps?

A. The hand pumps when I got them ready.

Q. They were in good condition?

A. Yes.

Q. The pipes all sound?

A. Yes.

Q. No holes in the suction?

A. Not that I know of.

Q. You didn't take one of the suction pipes of the hull pumps out and lay it on deck, and found a rusted hole?

A. The mate did that.

279 Q. It was done?

A. I saw it in the air coming out. I never examined it afterwards. I had all I could do about that time myself.

Q. Do you remember a seaman on the ship named Reichart?

A. I don't know one of their names.

Q. Don't you know that one of the seamen packed one of the pumps?

A. One of the seamen never done any such thing. All the packing that was done I done it myself. There was one of the seamen who gave me a hand once in a while to keep the fire going; that is all.

Q. On how many occasions were you so drunk that you didn't know what you were doing—you have told us about one—were there any others?

A. In connection with this?

Q. Yes.

A. Oh, no.

Q. There is only one occasion that you could sign a statement without knowing it?

A. In connection with this, yes, because after that I didn't think there would be any more to it.

Q. Are you positive that you didn't sign more than one statement or that you didn't sign statements on two different days when you were so drunk that you didn't know what you were doing?

A. I am positive that I did not.

Q. So that with the exception of this one day, if you signed any statements about this case, you know what you were doing?

A. I wouldn't swear that I signed it then.

Q. If you did sign statements on more than one day you will swear that there was only one day that you didn't know what you were doing?

A. I will swear to that, yes.

Q. Will you just sign your name on a piece of paper with pen and ink—just sign it a couple of times.

(The witness does so.)

280 Q. Will you examine these two papers and see if that is your signature which appears at the bottom (handing paper to witness)?

A. That shows I was drunk. I can't hardly read it myself but I see "George Wright" there.

Q. The question is, did you sign these papers?

A. I swear that all right enough.

Q. That is your signature?

A. Yes.

Q. I notice that one of these papers bears date the 11th of the

about 1953, and the other bears date the 18th of October, 1955, did you sign those papers on those days?

A. I wouldn't swear to that.

Q. You wouldn't swear whether you did or did not?

A. I am I want that all right enough.

Q. Did you swear to those affidavits?

A. Let me see that (the witness takes paper).

Q. Do you want to read them before you say that you swear to them?

A. No, I was looking at my name.

Q. Did you swear to those affidavits?

A. I suppose I did. I wouldn't swear to that now, though.

Q. If you did swear to that on the two different days shown here, you must have been under one of those three arrests, is that?

A. It seems so, but it don't look so from the writing though.

Counsel for respondent takes the two papers and holds them over as so to conceal all but the signatures on the paper and then examines it.

Q. I understand that you have been on this road some time before this trip on which she was hit?

A. Oh, that was just before that, probably 6 or 7 years before that.

Q. So that with the exception of that period long before you never had seen the road until the day that you actually walked?

A. No.

Q. And that was true of everybody else who walked on here—they walked just the day that she walked, everybody, the captain and all?

A. Yes.

Mr. Goodrich: I ask to have those two papers which I have not examined over for the signatures, marked for identification. I also ask to have marked for identification the signatures of the witness made a few moments ago on a sheet of legal cap.

Mr. Taylor: It is quite unnecessary to have the affidavits marked for identification, as I offer them in evidence.

Mr. Goodrich: I decline to consent to their going into evidence at this time, but I do desire to have them marked by the stenographer for identification,—all three of the papers.

(The paper containing the signature of the witness ready today is marked for identification, Respondent's Exhibit 4 of this case.)

Mr. Taylor refuses to allow the two affidavits to be marked for identification, on the grounds that they are being marked as exhibits and are actually offered by the Plaintiff and marking them for identification is unnecessary.

(The same are marked respectively, Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2 of this case.)

Counsel for respondent calls attention to his objection to the admissibility of the affidavits, the two affidavits and in

282 the necessity of their offer in court subject to the objection of counsel for respondent.

Mr. Englar: Mr. Goodrich's limiting of his examination of these documents to the signatures alone was of his own volition and not because of any refusal on my part to allow him to see them.

Mr. Goodrich: On the contrary, Mr. Englar offered me the papers but I didn't examine them.

By Mr. Englar:

Q. Now, with all your pumps going you could not keep the water down, could you?

A. No, sir.

Q. About how rapidly did it gain?

A. 3 or 4 inches an hour.

Q. Now, did you have the steam and hand pumps both going all the time?

A. Well, as far as the hand pumps are concerned, I didn't have nothing to do with them after getting them working, but the steam pumps they were going continually.

Q. Except when they were broken down?

A. Well, there was always some of them going.

Q. Did you have this wrecking pump going continuously?

A. Until it broke down, yes, sir.

Q. That is the one that had the cog wheels?

A. Yes.

Q. You say there is a cog wheel about 2 feet in diameter on the shaft of this wrecking pump?

A. On the shaft of the engine and another one about the same size on the pump.

By Mr. Goodrich:

Q. What was the size of the cog wheel on the engine shaft?

A. They were both about the same size,—about that big around (indicating).

283 By Mr. Englar:

Q. There were two wheels that clogged into each other?

A. Yes, sir.

Q. And they were both about two feet in diameter?

A. Yes.

Q. And you say three cogs broke off the wheel on the pump?

A. Yes.

Q. Were the three all at one place or at different places?

A. There was three at one place and a couple at another place, but it was the three that made any difference because they wouldn't go by one another.

Q. On account of these three cogs you couldn't work that pump?

A. On account of the three cogs we couldn't work that pump.

Q. This trouble with the cog wheels happened within an hour after you started the pumps?

A. Yes.

Q. Now, what was the diameter of this wrecking pump and of the suction?

A. Well, the suction of the wrecking pump two 4 inch suctions.

Q. It was a double pump, was it?

A. Yes, a double action pump.

Q. What were the suctions on the messenger pumps?

A. They were about the same.

Q. Two 4 inch suctions?

A. Yes, sir.

Q. Now, this pump that you say you packed was one of the messenger pumps?

A. One of the messenger pumps, yes.

Q. And in order to pack it you took the piston of the pump out?

A. I took one out and kept the other going. And it only took me about—

Q. I didn't ask you how long it took you—you took the piston out and you put new packing on the plunger?

A. On the plunger part of it.

284 Q. What kind of packing did you use?

A. Hemp.

Q. Was it specially prepared packing or ordinary yarn?

A. It was prepared for that purpose.

Q. Well, just describe it—tell us what it was.

A. Well, on the plunger of the pump there is a little flange about that wide (indicating about an inch) and that goes around it.

Q. This packing goes around that plunger?

A. This packing goes around that plunger and you can put in as much as you have a mind to.

Q. You just fill that place with hemp or anything you happen to have around?

A. Well, I had plenty of packing of all kinds.

Q. Tell us what sort of hemp this was—in what form was it?

A. Well, the hemp packing I had has a kind of a strand, not like the strand of rope but it is soft and pliable so you can get it in snug.

Q. It was hemp yarn?

A. No, there was no yarn to it; it was about as big around as my thumb.

Q. It was a round, soft strand of hemp, was it?

A. Yes.

Q. Describe the plunger of the pump as well as you can?

A. As I say, it was so much in diameter, I guess (the witness indicates about ten inches).

Q. Describe this place where you put the yarn?

A. Just as I tell you—that flange was there for that purpose.

Q. There was a flange on each side of the plunger?

A. Right around it and a little edge so the packing wouldn't slip up and down.

Q. There was a space between the two flanges where you put the packing?

A. Yes.

285 Q. Are you positive what make this messenger pump was?

A. I am not, but I think it was Edison's, though.

Q. You think it was an Edison pump, do you?

A. I think so.

Q. Then when you got that plunger packed did you pack the other one?

A. It didn't require it.

Q. About how fast did the water gain with one messenger pump running?

A. Three or four inches—well, one messenger pump wasn't stopped more than 15 or 20 minutes—15 minutes anyway.

Q. Well, how fast do you think it was gaining with one messenger pump running?

A. Well, it was gaining three or four inches an hour but I kept the circulating pump working all the time with a three inch suction.

Q. And do you remember some of the men coming aboard your vessel from the King Edgar?

A. I didn't see them coming aboard, no, because I was too busy. I was closed up in the engine room and dasen't open the doors half the time.

Q. You don't know whether any of the men from the King Edgar came on board or not?

A. I know they come aboard but I didn't see them coming aboard.

Q. But you know that they were on board, do you?

A. Oh, yes.

Q. And the time they were on board you say your pumps were running and throwing a full supply of water?

A. Yes.

Q. And all that you really know is that your messenger pumps were running?

A. The messenger pump and the circulating pump.

Q. That is a small pump used for feeding the boiler—that circulating pump?

A. Yes, but with a three inch suction it was throwing a great deal of water.

286 Q. That is not intended to pump the vessel, is it?

A. I didn't use it to feed the boilers with.

Q. That is not intended for pumping the vessel, is it?

A. For washing down the vessel.

Q. The only big pump that you had running or that you know was running was the messenger pumps?

A. The messenger pumps after the wrecking pumps broke down, but the hand pumps—I suppose they were running.

Q. But you don't know that?

A. No, I had enough to attend to to look out for my own business.

Q. So all you really know that was going on in the way of pumping was this messenger pump and this small circulating pump—

A. Yes; under any ordinary circumstances the messenger pumps would have been plenty.

Q. Now, these messenger pumps run by a chain?

A. The messenger pumps run by a chain connected with the donkey engine.

Q. And that chain broke, didn't it?

A. Once, yes; it took only three or four minutes to mend it, that is all. I had plenty of connecting links. All I had to do was to link them in again.

Q. You are willing to swear that you didn't have any trouble with that chain slipping?

A. Yes, sir; I am, it never slipped on me.

Q. And it only broke once you say?

A. Yes, sir, it only broke once.

Q. On what occasion?

A. I couldn't tell you the hour or minute, or anything like that.

Q. What day was that?

A. Well, it was in the night time when it broke.

Q. You don't remember what night it was?

A. No, sir, I don't remember what night it was.

Q. Was it the first couple of days?

A. No, sir, it was the second night.

287 Q. That would be Wednesday night or Thursday night?

A. About Thursday night, I guess. It didn't take me ten minutes to get it going again.

Q. Now, the most water that you ever had in the vessel was eight feet, wasn't it?

A. When I left her she had 13 feet and a half.

Q. How long had she had that?

A. She only had it then. I didn't wait until afterwards to see how much more she had.

Q. That was on Saturday, was it?

A. Yes, Saturday when I jumped off the schooner.

Q. How much did she have on Friday when you first saw the steamer?

A. Anywhere from 8 to 10 feet. I wouldn't have left her then if the rest hadn't given her up and the hawser had parted.

Q. You say that you had plenty of this hemp to repair the pump?

A. Yes, any amount of it.

Q. Where was it?

A. In the engine room; part of it in my room and part of it in the lockers there.

Q. Was it in bales or bundles or how did you have it?

A. In a kind of a little bale like a small bundle. Then I had plenty of rubber packing of all kinds and sizes for different purposes and plenty of rubbers for the hand pumps.

Q. How much water would you say this messenger pump would throw per hour, that is, in gallons or barrels?

A. Well, I should say about 12 inches an hour.

Q. How much would you say one of these hand pumps would throw if you had it working all along?

A. Probably 3 inches an hour.

Q. The same size suction?

288 A. Yes, but there would be only one or two men working it. There would be a little difference between that and steam, you know.

Q. With two men working it you think that she would throw about three inches an hour?

A. With two men working it I think she would throw about three inches an hour and working steady at it she would give about 4 or 5 inches an hour, I think.

Q. Are you positive that there were three hand pumps on board?

A. I am positive there were three hand pumps,—two aft and one forward.

Q. You are sure that there was one forward, are you?

A. Yes, sir.

Q. How was your vessel when she had this water in—down by the head or down by the stern?

A. She was going down bodily.

Q. She didn't have any pitch either way, didn't she?

A. No, sir.

Q. Now, you found between three and four feet of water in the vessel on Wednesday morning early?

A. Well, I won't swear to the day or date.

Q. That is your best recollection, is it?

A. Yes, that is my best recollection.

Q. And you left her with about 13½ feet of water on the following Saturday?

A. There was 13½ feet of water in her when I jumped for the boat.

Q. So that she gained about ten feet in about 3 days and a night?

A. Yes, sir.

Q. What time on Saturday did you leave her?

A. I left her about 10 o'clock in the morning, I believe.

Q. So that she gained these 10 feet in a little over three full days of 24 hours each?

A. Yes, sir, she did.

Q. So that she was gaining a little over 3 feet a day, should you judge?

A. Yes, sir.

289 Q. Have you ever run on a vessel that had pumps on board where you just turned the steam into from the boiler without any chains or cog-wheels?

A. Yes, lots of them.

Q. All the modern pumps are of that style, are they?

A. Yes; there are no cog-wheels attached to the modern ones.

Q. You just turn the steam from the boiler right into the pump?

A. Yes, you turn it right into the steam chest of the pump.

Q. It is a combination of an engine and a pump,—is that so?

A. Yes.

Q. A pump of that kind, if you have a hose you can put it in any place on the boat and it will pump—is that so?

A. Yes, sir.

Redirect by Mr. Goodrich:

Q. Did you work the circulating pump at the same time that you worked the messenger pump?

A. Continuously, yes, sir.

Q. Was your boiler capacity sufficient to work the wrecking pump, the circulating pump and the messenger pumps at the same time?

A. Yes, sir, by forcing it a little, you could.

Q. You could have worked all three?

A. Yes, sir, by forcing it a little. I ran the circulating pump anyhow so as to save condensing my steam back to water,—to save fresh water.

Q. Do you know anything about the hand pumps being broken?

A. Well, I saw one in the air but I had no time to go out and examine it. That was the mate's concern just then.

Q. Do you know how it happened to get broken—did you know that it was broken or out of order?

A. It wasn't broken until they undertook to take it out and then the heavy working of the vessel bent the pipe up as it was
290 coming up through the decks.

Q. How did they get it out, do you know?

A. They got it out with a spanker throat halyard.

Q. Now, after the packing of the messenger pump did that work all right?

A. Yes, sir.

Q. You had plenty of packing and supplies on board?

A. Yes, any amount of it for a West Indies trip.

Q. When you were down in the hold did you see whether any water was coming through the deck?

A. Well, I knew there was nothing coming.

Q. Did you look?

A. Yes.

Q. Did you see any coming in?

A. No, sir, because I would have felt it if it was coming down on top of me. No,—our deck was perfectly tight.

(Signing waived.)

291 *Deposition of Frederick A. Wallace.*

United States District Court, Southern District of New York.

BENNER LINE

VS.

FIELDS S. PENDLETON et al.

Before Edward J. O'Connor, Notary Public.

Deposition of Frederick A. Wallace on Behalf of Respondent, Taken by Consent at the Office of Edward J. O'Connor, Notary Public, 120 Exchange Street, Portland, Maine, this 17th Day of May, 1913, under the Same Stipulation as Heretofore.

Present:

Harrington, Bigham & Englar (Mr. Englar), for Libellant;
William H. Gulliver, for Respondent.

FREDERICK A. WALLACE, being duly sworn as a witness on behalf of the respondent, testified as follows:

Direct examination by Mr. Gulliver:

Q. State your full name, Captain?

A. Frederick A. Wallace.

Q. Where do you reside at the present time?

A. Millbridge, Maine, Washington County.

Q. Are you following the sea at the present time, Captain?

A. No, sir.

292 Q. What is the reason for that?

A. I am in the physician's hands.

Q. How long have you been sick?

A. About 16 months as near as I can tell now.

Q. Whether or not you soon expect to go under an operation of some kind?

A. Yes, sir.

Q. At Portland?

A. Portland or Bangor, I haven't decided yet.

Q. And how long have you been told that you will be confined to the hospital on account of that operation?

A. Four to five weeks, sir.

Q. How old are you, Captain?

A. Sixty-three years old the third day of May.

Q. How long have you been following the sea?

A. I have been following the sea since I was fourteen years old, sir.

Q. Have you ever been master of a vessel?

A. Yes, sir.

Q. When were you first master of a vessel?

A. When I was eighteen years old.

Q. What vessel was that, do you recall?

A. A small coastwise schooner called the "Sea Bird."

Q. Since you were eighteen years old, state in a general way what your maritime experience has been? State what your sea going experience has been since you were eighteen years of age?

A. I have been all around the world you might say, back and forth.

Q. And in what classes of vessels have you sailed since that time?

A. Schooners, barks, brigs, barkentines, ships.

Q. And in what capacities have you sailed?

A. Master, mate and sailing master.

Q. How many years since you were eighteen years of age have you sailed as master in vessels?

A. About 35 years.

293 Q. And what has been the class of the vessels you have sailed in as master?

A. Schooners and barkentines and barks.

Q. Now calling your attention particularly to schooners, what has been the average tonnage of the vessels you have sailed in during that time?

A. All the way from 150 to 1400 tons.

Q. Whether or not since you were fourteen years of age, your sole employment has been aboard vessels?

A. Yes, sir.

Q. Have you got a license as master?

A. I haven't just now, it ran out. When I get my eye fixed I will have it renewed again.

Q. When did you get your first license?

A. I got my first license when they were first issued. It was for over 700 tons gross.

Q. Do you remember where that was, Captain?

A. Philadelphia.

Q. And it was the schooner Harry A. Berwind?

A. The schooner, Harry A. Berwind, yes, sir.

Q. A four-masted vessel?

A. Yes, sir.

Q. About 900 tons net?

A. 900 net tons, and some odd.

Q. Whether or not sometime in the latter part of July or the first part of August, 1910, you took command of the schooner Edith Olcott?

A. Yes, sir.

Q. And what were the circumstances of your taking that command?

A. Well, I was looking for a better job than what I had, sir.

Q. Go on and tell by whom you were employed.

A. I was employed aboard the Frances C. Tunnell of Philadelphia, that was her home port.

Q. Go right on, Captain.

A. I was lying over at the Erie Dock, New Jersey, discharging railroad ties. I came over to New York to get my mail on
294 Thursday. I met a man on South Street, 10 or 11, I forget which it was now. The Edith Olcott laid there. He said the captain wanted a master to perform the voyage. I asked him where the master was and he said aboard the vessel.

Q. Did you see the master?

A. I went down and saw the master.

Q. Who was master at that time?

A. Captain Fletcher.

Q. State whether or not he employed you to make this voyage in the Edith Olcott?

A. Yes, sir, I spoke to Captain Fletcher. I says "I understand you want a man to perform this voyage for you." He said he did. I told him I would like to have the position. He told me he was talking with a man in Boston, and would let me know next day if I came around.

Q. Did you meet the captain next day?

A. I met the captain the next day.

Q. Whether or not you then concluded your arrangement with him whereby you were to command the vessel on this voyage?

A. Yes, sir.

Q. What time did you go aboard the vessel?

A. I went aboard the vessel about quarter past three on Saturday.

Q. By whom had the crew been shipped, do you know?

A. By Captain Fletcher.

Q. How long after you went aboard did she cast off?

A. As soon as I could get on deck and tell the towboat we were ready. He says "cast off your lines and we will go."

Q. Now after the tug took you in tow, where did you proceed?

A. We proceeded down outside Sandy Hook and got off Scotland Lightship where the towboat was to take her. The wind
295 came from the southwest and the tide turned to run in, so there was no way to make any progress, and I anchored.

Q. Go on from there.

A. In the morning at four o'clock I came on deck. I saw the wind was to the northward, and I told the mate to call the engineer and get steam up and we would get under way.

Q. Now as I understand it, you left the dock in New York on Saturday?

A. We left New York on Saturday afternoon about half past three, as near as my judgment—

Q. After anchoring for the night out by Scotland Light, you put sails on her next morning, Sunday?

A. Sunday morning we got under way.

Q. Now go on from there.

A. We got started between five and six o'clock and proceeded on the voyage for Porto Rico.

Q. What kind of weather did you have that day and the next?

A. We had fine weather Sunday, northerly wind, lasted until Monday about noon, died out calm, wind came from the southward and westward, breezing up.

Q. Now Captain, we will stop right there for a moment. What precautions, if any, did you take in respect to your hawse pipe stoppers after you got anchored out at Scotland Light?

A. When the anchors on the bow were secured, we plugged the hawse pipes up to prevent the water from coming in.

Q. What, if anything, did you do in respect to the chain covers?

A. After we had put in the hawse pipe plugs, the chain pipes go down through the decks into the chain lockers, and there in an iron cover that covers it over, going across the links.

296 Q. Did you put those covers on?

A. We put those covers on, yes sir.

Q. Coming back again Monday, go on from there.

A. Monday the wind breezed up from the southward and westward, Monday night it was blowing pretty fresh. We took in the light sail called the gaff top sail and outer jib, the sea was making, the barometer was falling indicating bad weather.

Q. Now what sort of weather did you have Tuesday?

A. Tuesday it was rough and we were shipping much water above decks.

Q. What time were you on watch Tuesday night?

A. Tuesday night I came on watch from 12 o'clock to 4 in the morning.

Q. Are you sure of that Captain, Tuesday night?

A. Tuesday night at 12 o'clock I came on deck.

Q. And what was the condition of the wind and sea at that time?

A. The wind was fresh and squally and a heavy sea running.

Q. Captain, what was the rule aboard the Olcott and what is the rule aboard other vessels as to sounding the pumps?

Objection by Mr. Englar as incompetent, irrelevant and immaterial.

A. The rule aboard steam vessels is that the engineer is to sound all the pumps and notify the captain when there is any water.

Q. You said the rule aboard "steam vessels." Did you mean steam vessels?

A. I mean vessels that have steam power for hoisting the sails and heaving anchor.

Motion to strike answer out by Mr. Englar.

297 Q. Now captain, what was the practice aboard the Olcott as to sounding the pumps?

A. The engineer had the sounding rod and sounded the pumps, and he was to let me know when there was any water in the vessel.

Mr. Englar: Same objection.

Motion to strike out answer.

Q. What hours was the engineer supposed to sound the pumps?

A. Eight o'clock in the morning after breakfast and at night after supper.

Q. Where was the sounding well?

A. The sounding well was in the forward cabin under the dining room table.

Q. That is in the after house, Captain?

A. That is in the after house.

Q. When did you first get any reports from the engineer as to there being any water in the hold of the Olcott?

A. Wednesday morning at eight o'clock.

Q. What were the circumstances about that?

A. What do you mean, sir?

Q. What report did he make?

A. He made the report, "My God," he says, "there is water in this vessel." I says, "How much?" He says "four feet." I says "you start the wrecking pump up."

Q. Were you present when he made the sounding?

A. I was in my room winding the chronometer when he sounded and told me what water he found in her.

Q. That was the Wednesday morning about what time?

A. Eight o'clock, about five minutes past or five minutes of. I wind the chronometer after breakfast.

Q. State what the condition of the wind and sea was when
298 you went on watch at 12 o'clock midnight.

A. Fresh breeze, choppy sea, squally, rain squalls, heavy sea running, vessel shipping a large amount of water around the decks.

Q. Do you know whether the engineer followed your orders about starting the pumps?

A. Yes sir, he did.

Q. What pump did he start?

A. The wrecking pump.

Q. How long did he continue to run that wrecking pump?

A. About an hour, as near as I could judge, when he reported to me it was out of commission.

Q. What did he say put it out of commission?

Mr. Englar: I object to what the engineer said.

A. The engineer said the cogs were broken on the wheel.

Mr. Englar: Just what did he say, Captain?

A. He said the cogs were broken on the wheel.

Mr. Englar: I move that this be stricken out as incompetent, irrelevant and immaterial.

Mr. Gulliver: I submit that the question which the proctor asked to have stricken out is his own question.

Mr. Englar: I will make a statement in answer to that if you want that in.

Mr. Gulliver: Yes, I want that in.

Mr. Englar: I simply repeated the question to the captain because I thought the stenographer had not understood his answer.

299 I object to any questions as to what the engineer said, but if what he said is going into the record, I want to be sure it goes in correctly.

Q. After the engineer had made a report to you as to the wrecking pump, what orders did you give him?

A. I gave him orders to start the messenger pump and circulating pump.

Q. Do you know whether he started them?

A. He started them, sir.

Q. How do you know that he started them?

A. Because I heard them going and saw the water coming out on deck; the messenger pump pumps water on the main deck.

Q. Where does the wrecking pump discharge its water?

A. Out through a pipe through the side of the vessel.

Q. While the wrecking pump was running, what did you observe as to whether or not it was discharging water?

A. Looking over the side I could see water coming from the side of the vessel, it was heaving water.

Q. In what quantities was it discharging water?

A. Discharging a large quantity, a stream as big as the pipe would allow.

Q. How far would it throw water from the vessel's side?

A. About two or three feet.

Q. When you observed the messenger pump in action, what did you observe or notice as to the quantity of water discharged on the deck of the schooner?

A. It was heaving it as it generally does with those kind of pumps, so much by the stroke as we call it.

Q. What further orders, if any, did you give after water had been reported in the vessel as to the use of any pumps?

A. Gave orders to get the hand pumps going.

300 Q. What was done in respect to making use of the hand pumps?

A. They brought the draw bucket along to draw water to catch the hand pumps, the engineer and three men came along.

Q. After they had drawn the water and the men came along, what did you do?

A. Turned water in the pump and caught it, got the port pump going. The port pump worked hard, we worked a couple of hours, and we thought we would try the starboard pump.

Q. Do you know why the port pump worked hard?

A. I suppose on account of new packing which swelled and made it work hard.

Q. How many men did you have working the port pump?

A. I had three.

Q. After they stopped working the port pump and tried the starboard pump, state what result they got from using the starboard pump?

A. They started the starboard pump and it worked a little easier and got more water.

Q. How long did you continue to use the starboard pump?

A. About an hour and a half. I heard the men say, "Captain, we cannot get the pump brake down. It works with a brake."

Q. What did you do then?

A. Went to see what the trouble was. As soon as they let go the brake, I told them to bear down as hard as they could. They could not hardly get it down before it would come right up.

Q. Well, what did you do then?

A. I saw then there was something choking the pump.

Q. How did you know something was choking the pump?

A. You could see something was choking it. You could see it was choked because you could not get the pump brake down, it was not free.

301 Q. What did you observe as to the clapper valve?

A. The clapper sucked so hard down it took all you could do to get it out with your fingers. Then to make sure it was stopped up, I put a bucket of water in and tried to catch it again, but found I could not catch it, and came to the conclusion it was choked.

Q. Was there any lack of suction?

A. Yes, sir, we could get no suction on it at all.

Q. You mean you could not lift any water?

A. Could not get any water out of it, could not lift any water.

Q. Had there been any holes in the pipe connected with this pump, what would you have expected to have been the result when you tried to pump water with it?

A. If there had been any holes in the pump pipe, we could not have got any suction on it.

Q. What would have been the appearance of any water you could have lifted?

A. If there had been holes in it, if we got any water at all, it would kind of bubble up.

Q. Did it work that way?

A. It did not work that way.

Q. Do I understand the suction held the clapper down?

Q. These two hand pumps we have been speak- about are located where?

A. On the forward side of the after house in what we call the cabin.

Q. On the poop deck?

A. On the poop deck between the forward part of the after house and the spanker mast.

Q. Do you know how many decks that pipe has to pass through before it gets into the bilge?

A. Three.

Q. Now when you concluded that this pump was choked,
302 what course did you determine on?

A. I told the mate we would hoist it out and see what the trouble was.

Q. What did the mate do?

A. The mate got the men there and put the spanker throat hal-yards on to it, got it hooked onto it and commenced to hoist it out. I saw it came out pretty hard. I took the wheel and let the man at the wheel assist them to get it out.

Q. How long did it take you to get it out?

A. It took us about four hours.

Q. Did you notice the condition of that pipe as it came out through?

A. I saw it from where I was. The pipe looked all right.

Q. Were there any holes in it?

A. I never saw any.

Q. Was the vessel working any or rolling any during this time?

A. The vessel was rolling, rolled pretty heavily.

Q. Do you know how closely this pipe fitted down through the decks?

A. It went close to the decks.

Q. In getting that pipe out, what happened to the pipe?

A. It got dented and crooked.

Q. What did you intend to do with that pipe after you got it out?

A. I intended to saw a piece off the bottom of it so it would not get choked.

Q. What time of day was it that you finally got it up through the decks?

A. It was after dinner.

Q. I mean when you got it up through?

A. It was pretty near dark.

Q. What orders did you give then about doing anything to that pipe or pump?

A. I told them we would lash the pump on deck, take some
303 canvas and nail a board over the hole in the deck so that the water would not go down, and started the hand pump again, the port pump.

Q. Why didn't you replace that starboard pump that night?

A. Because we could not get it down, it could not go through the deck again it was so crooked.

Q. Did you try the hand pump, the port hand pump again?

A. Yes, sir.

Q. With what results?

A. We got water out of it as long as the men could stay there.

Q. What prevented the men from staying there?

A. Shipping seas, washed their feet out from under them, they could not stand it.

Q. How long did they pump after that?

A. I should judge two hours and a half, something like that, I did not set any regular time. They stayed there as long as they could.

Q. Now coming back to the morning again, after you had been told there was four feet of water in the hold, what orders did you give, if any, about shortening sail?

A. I took in the spanker and furled it up, and the flying jib.

Q. What sort of weather did the schooner make that way?

A. She labored hard and was shipping much water.

Q. How was the wind and sea?

A. The wind was from the Southwest, choppy sea, kind of a cross
sea. Being in the Gulf Stream, the sea does not run regularly.

Q. You were in the Gulf Stream?

A. Along the edge of the Gulf Stream.

Q. Was the wind blowing hard or otherwise?

A. The wind blowed hard and squally.

Q. Were the seas high or otherwise?

A. The seas were running high.

304 Q. Still calling your attention to Wednesday, do -ou know whether or not steam was kept up in the boiler that day, and whether or not the messenger pump continued to work?

A. The pumps were going all the time, steam was in the boiler. I never heard any report.

Q. Whether or not the circulating pump was working?

A. The circulating pump was working.

Q. Do you know whether it was on Wednesday or the next day that the chain on the messenger pump broke?

A. The chain on the messenger pump parted Thursday morning.

Q. How long did that put the messenger pump out of commis-
sion?

A. Not more than ten or fifteen minutes at the longest, just long enough to put in a link.

Q. Whether or not it became necessary on either Wednesday or Thursday to repack one of the messenger pumps?

A. Yes, they had to repack one, it was on a Thursday.

Q. Have you a good idea of how much time that required?

A. It took not more than fifteen minutes at the longest, to put the packing on.

Q. Now did you cause soundings to be taken at intervals on Wednesday?

A. Yes, sir.

Q. What did you find out as to whether you were holding the water or not?

A. I found out it was gaining.

Q. The vessel was leaking more?

A. The vessel was leaking more.

Q. Did you get a report some time on Wednesday from the engineer as to anything that happened the night before?

Mr. Englar: I object to that. Any report the engineer made is hearsay.

305 A. About ten or eleven o'clock when he sounded the pump and found the water gaining on her, he says "I think something must have struck this vessel." I says "I should think so too by the appearance of the water there is in her." He said he felt a shock in the night. I asked him what time that was. He said about one or two o'clock. He asked me if I heard it. I says "No, nothing more than the ordinary feeling of rough weather."

Mr. Englar: I move to strike out that entire conversation as incompetent, irrelevant and immaterial, and as hearsay.

Q. Where did the engineer sleep? Captain?

A. In the forward house, the starboard side of the forward house.

Q. Was there any way of getting down on to the ceiling of the ship where these hand pumps went through so as to clear out that choked pipe?

A. No, sir.

Q. She had cargo in her all around?

A. No, sir, you could not get down to them.

Q. Did you go below?

A. I went below after I found the amount of water in her in the morning after the engineer reported to me.

Q. Tell us what you found when you went below.

A. I went down below and I found that the water was pretty near up to the top of the keelson.

Q. Where was that, in the forward part?

A. Down in the fore hold, yes sir.

Q. What did you observe as to whether the sea cocks were open or closed?

A. The sea cock was closed, no water passing through that.

Q. Did you determine where the water was coming in? Did you find the leak?

A. No, sir.

Q. What sort of weather did you get Wednesday night?

306 A. Rough, squally, heavy sea running.

Q. Now what sort of weather did you get Thursday?

A. Thursday it was rough, choppy sea, rain squally.

Q. What do you say as to whether you were able to hold the water Wednesday night? Did the water gain on your pumps any Wednesday night?

A. Yes, sir.

Q. What about Thursday?

A. Thursday it gained.

Q. What was the weather Thursday?

A. Thursday it was rough, rain squally.

Q. Did the weather moderate any Thursday for awhile?

A. It moderated a little in the forenoon.

Q. Do you remember how much water there was in the hold Thursday?

A. Eight feet.

Q. What do you say as to whether you were able to hold the water at eight feet on Thursday during this time the weather moderated?

A. It kind of moderated, the vessel eased a little bit after the sails were taken off her, took off the sails to ease her up, everything but the fore stay sail and jib, and kept her before the sea.

Q. Was the messenger pump working Thursday?

A. Yes, sir.

Q. What do you say as to whether the port hand pump was working?

A. We could not work the port hand pump on account of the water washing across the deck.

Q. When you stopped using the port hand pump, was it working all right?

A. Yes, sir.

Q. Now coming to the next day, which was Friday, what was the condition of the sea and wind on the morning of that day?

307 A. Friday it was rain squally, sea running, vessel, rolling pretty bad, shipping a large amount of water, as she settled in the water with the amount of water she had in her.

Q. Whether or not the leak increased on the pumps that day?

A. No sir, they held it at eight feet.

Q. On Friday?

A. Yes sir, Friday.

Q. When it became rough around Friday, did the water gain on you any?

A. No sir, we held it at eight feet. That was when we sighted the steamer.

Q. You didn't sight the steamer until the next day, did you?

A. Friday.

Q. How were your messenger pumps working Friday?

A. Working all right, sir.

Q. Whether or not she was shipping any water over the bows around by the engine room on Friday?

A. That was on Friday evening after the steamboat had got started with the vessel.

Q. Now let us see if we are right about this Friday or not, Captain. You found water first on Wednesday morning?

A. Yes, sir.

Q. The next day was Thursday?

A. Yes, sir.

Q. The next day was Friday?

A. Yes, sir.

Q. Now what day did you leave the ship?

A. I left the ship Saturday morning about eight o'clock.

Q. I wish you would think a minute, Captain, and see what morning it was you sighted the King Edgar.

A. Friday morning, sir. I won't be positive, Friday or Saturday. I was thinking it was Friday but won't be sure of it.

Q. Captain, state whether or not you kept your messenger pumps going continuously from the time you started them until you
308 sighted the King Edgar?

A. The messenger pumps were going all the time, and the circulating pump, until we sighted the King Edgar, only long enough to fix the messenger pump.

Q. Whether or not after you had been taken in tow by the King Edgar, they were kept going?

A. After we had been taken in tow, they were going.

Q. When did the messenger pumps stop?

A. I could not say. They were not stopped while I was there.

Q. I mean in respect to the time you finally abandoned the schooner?

A. They only stopped long enough to fix the chain on the pump.

Q. Were they running when you abandoned the schooner?

A. No, sir, they were not running when we abandoned the schooner.

Q. By whom were they stopped?

A. By the engineer, I presume.

Q. When was that?

A. In the morning about six o'clock, I should judge.

Q. Just before you left the Olcott?

A. Just before we left the Olcott, yes. When the captain ordered us to get in the boat, I told the engineer to prepare to get in the boat and not to take any effects.

Q. What did you observe as to whether or not those messenger pumps were throwing the usual amount of water all the time?

A. They were heaving the usual amount of water all the time as far as I could see. I was not watching them all the time, I was in the other end of the ship, but they were going.

Q. Captain, did you set fire to the vessel when you abandoned her?

A. No sir.

Q. Was any trouble with the suction of the wrecking
309 or messenger pumps reported to you?

A. No, sir.

Q. Now what, if anything, did you observe as to there being a coating around the pipe of the wrecking pump where it passes down through the deck in the forward house? Was there a canvas coating?

A. There was a regular canvas coating put around the wrecking pump to keep the water from going down into the hold, to keep it from damaging perishable cargo.

Q. And just how was that put around the pipe of the wrecking pump?

A. It was put around the pump, the canvas was turned up that way (indicating), and sizing put around it, sewed up and turned down over the sizing so as to fit tight. That keeps the water from going inside. It is tacked down on the deck with lead and copper tacks.

Q. Captain, have you had some experience before this time with a vessel springing a leak?

A. Yes, sir.

Q. Do you recall one instance in particular?

Mr. Englar: I object to any other instance of vessels springing a leak, as incompetent, irrelevant and immaterial.

A. I was in one schooner at one time going from New York to Boston loaded with coal, a schooner four years old and made very little water to speak of. We sounded the pumps same as we ordinarily do. One morning we sounded the pumps and found she had about two feet of water in her, caught the pumps and pumped her out. Went to Boston with my coal, and went to Millbridge, Maine, where I belong, took her on the railway dock to clean the bottom and paint her, and found a plank where a sword fish had stuck his sword up through, and a piece of the sword fish's sword as long as that (indicating about six inches) in her.

Mr. Englar: I move to shrike out the answer as incompetent, irrelevant and immaterial.

Q. Captain, what, if anything, did you observe as to how this vessel was fitted and provisioned?

A. She was fitted and provisioned, I should say, for a six to nine months' voyage, what I saw.

Q. What did you observe as to the general character of the hand pumps?

A. The general character of the hand pumps was the same as hand pumps generally are.

Q. On vessels of that class?

A. On vessels of that size.

Q. What have you to say as to the general character, kind, and condition of the wrecking pump and the messenger pumps?

A. All right, as far as I could see. I am not much, experienced on machinery, I know nothing about it. The pumps worked all right and were in good condition as far as I know.

Q. It has been stated by one witness that when an officer and part of the crew of the King Edgar came aboard the Olcott that her seams were open and her butts were open.

A. Her deck was in perfect order and the butts. A man looking at them would think the vessel was not more than two years old. I saw nothing of the kind, seams open or butts open.

Q. Was that same thing true of the condition of her deck at the time the officers of the King Edgar boarded you?

A. Yes, sir.

Q. Something has been testified to by one of the officers of the King Edgar in respect to this towage contract. State your
311 recollection of that, please.

A. The towage contract, well they told me to send my boat aboard and they would send a contract aboard to sign. I got my boat down and the mate and the men got in her.

Q. Just a moment. Did you send a boat aboard the King Edgar?

A. Yes, sir.

Q. Whether or not a written contract was sent back to you from the King Edgar?

A. Yes, sir.

Q. For you to sign?

A. Yes, sir.

Q. Do you know what became of the boat which you sent aboard the King Edgar?

A. They hoisted it aboard the King Edgar.

Q. Whether or not that boat was brought to New York on the deck of the King Edgar?

A. It was brought to New York on the King Edgar's side davits that they have for hoisting boats.

Q. Was it at any time cast adrift by members of your crew?

A. Not to my knowledge.

Q. What boat did you take when you abandoned the Olcott to go aboard the steamer?

A. The King Edgar's boat.

Q. Do you know whether the pumps were sounded Tuesday night?

A. The pumps were sounded Tuesday night after supper, they told me.

Q. Was any report made to you Tuesday night about there being any water?

A. No, sir.

Q. What did you observe during this time as to your barometer?

A. The barometer was falling.

Q. How would you describe generally the weather that the schooner experienced, we will say from Tuesday night until the King Edgar hove in sight?

A. Some would say it was boisterous rough weather, I call it rough and boisterous seas, high seas. I have seen rougher weather.

312 Q. Do you remember that you were master of the "Willie H. Child" after the Olcott was lost?

A. Yes, sir.

Q. Do you recall any conversation that you had with one Gustaf Linder, who was engineer at one time on the "Child" with you?

A. I didn't have any conversation with any engineer.

Q. I call your attention to it particularly then. Gustaf Linder claims he was engineer on the "Willie H. Child" when you were master one time.

A. Yes, sir.

Q. And that you inquired of him as to whether there was sufficient pump packing aboard. Do you recall any such inquiry?

A. No, sir.

Q. And that you said further to him that you wanted to be sure there was plenty of good packing aboard because you did not want to get into the same scrape as you did on the Olcott. Did you ever have any such talk with him?

A. I don't remember anything like that happening.

Q. Did you ever have any such talk?

A. No, sir, I never had no such talk with him.

Q. Or did you know he had anything to do with the Olcott?

A. No, sir.

Q. Was the Olcott the first vessel that was lost under your command?

A. Yes, sir.

Q. What was the Olcott's general appearance when you boarded her at New York?

A. She looked like a nice able vessel to me.

Q. How did she act considering conditions of wind and weather at this time?

A. She acted as a nice sea boat.

Q. Was her general outside appearance good or bad?

A. Her outside appearance was good. Everything looked good to me.

Q. What about the rigging and deck house and deck?

A. Everything looked good.

313 Q. Deck fittings and everything?

A. Everything looked good.

Q. How much water was there in the hold of the Olcott when the King Edgar sent a boat crew aboard?

A. 13½ feet in the sounding line.

Q. When the King Edgar's crew came aboard?

A. Eight feet.

Q. How much was there in the schooner when you abandoned her?

A. 13½ feet.

Q. After the King Edgar's crew came aboard, you were only working the messenger pump?

A. That is all, the messenger and circulating pump.

Q. How many hours did the King Edgar have your schooner in tow?

A. About twelve hours. We got started about four or five o'clock in the afternoon, and the hawser parted about five o'clock next morn-

ing. That would be about twelve hours, I should call it, as near as I can tell.

Q. And from the time they first boarded you until she cast you adrift, the water had gained some five feet or so?

A. Yes, sir.

Q. How large a stream would that messenger pump throw?

A. I could not estimate how large a stream, it was supposed to heave a couple of gallons at one pump.

Q. How large a crew did you have aboard the Olcott?

A. Altogether, you mean.

Q. Yes.

A. Nine altogether including me.

Q. And those were yourself, mate, engineer, cook and five seamen?

A. Yes, sir. Then there was this Porto Rican boy and another one that stowed away, a Porto Rican, we took him as a passenger.

Q. With the crew you had aboard the Olcott and under the conditions of weather existing, could you have manned both these hand pumps and kept them going continuously?

A. No, sir.

314 Q. Why not?

A. Because they worked hard and there was a long suction to work it.

Q. If both of these hand pumps had been working easily, could you have kept them going continuously with the crew you had?

A. No, sir.

Q. For about how long could three men pump steadily at a time?

A. Not over twenty minutes at the longest.

Q. You would have to be continually relieving one of the men?

A. Yes, sir.

Q. Do you know whether or not it is a common thing for pumps to get clogged on account of something getting down at the seat of them?

A. Yes, sir, very common that is.

Q. Where a vessel is loaded with a full cargo, is there any way of getting at the trouble other than by pulling the pipe out through the deck?

A. Yes, sir, I have been in vessels where there was a place to go down, but only two.

Q. Where there is no place to get down, you have to pull the pipe up through?

A. Yes, sir.

Q. Were the Porto Ricans any good to you during this storm?

A. No, sir.

Q. What was the matter with them?

A. They were sick and scared.

Q. It has been said by one of the witnesses on the steamer, Captain, that this pump was in such bad condition, this pump pipe was in such bad condition that it was almost ready to fall apart. What do you say as to that?

A. The pipe was all right.

Q. What caused the dents in it?

A. Hoisting it out of the deck, sir, swinging about and working it getting it out of the deck.

315 Cross-examination.

Question- by Mr. Englar, representing libellant:

Q. Now Captain, you had no opportunity to examine this schooner Edith Olcott before you sailed in her, did you?

A. No, sir.

Q. You went aboard and sailed right out?

A. I went aboard and sailed right out same as you would get on a train of cars.

Q. You understand you are under oath here?

A. I understand I am under oath.

Q. And you respect an oath, don't you?

A. Yes, sir.

Q. You would not say anything that was not true?

A. I would not say anything that was not true, because I have no occasion to.

Q. You personally did not know very much about what the pumps were doing, do you?

A. I only knew that they were actually heaving water, I saw that.

Q. Sometimes you saw that?

A. I saw it when I was around where the pumps were, I was not there all the time.

Q. Most of the time you were not around where the pumps were, were you?

A. Yes, sir, most of the time I was around where the pumps were.

Q. Will you swear that this messenger chain was not sliding off the wheel from time to time?

A. Not as I know of, not to my knowledge.

Q. Didn't you ever see it slide off the wheel?

A. No, sir, I never saw it slide off the wheel.

Q. You never saw it break but once?

A. I saw it break once. I went to see what the trouble was. They had the chain off and they were not over fifteen minutes doing it.

316 Q. Captain, have you not ever said to anybody that if you had had your pumps in good condition, you would have been able to get that vessel to port?

A. No, sir, not to anybody have I ever mentioned about the Edith Olcott's pumps or anything about the Edith Olcott, except Mr. Gulliver and Mr. Pendleton.

Q. Do you know E. H. Weaver?

A. Yes, sir.

Q. Where does he live?

A. He lives in New Haven.

Q. Have you not ever spoken to him about this accident?

A. No, sir.

Q. Never said anything to him?

A. No, sir.

- Q. You never said anything about the Edith Olcott in any way?
- A. No, sir.
- Q. And you have never spoken to anybody about how the vessel was lost?
- A. No, sir, except Mr. Pendleton and Mr. Gulliver here.
- Q. Now have you been sailing for Mr. Pendleton since the Olcott was lost?
- A. No, sir, only one short trip for them.
- Q. When was that?
- A. 1911.
- Q. Was that the last trip you made?
- A. Yes, sir.
- Q. What schooner was that?
- A. The Sallie Ione.
- Q. Did you make any special examination of the pipe on this hand pump you hauled out?
- A. No special examination.
- Q. You did not go and look at it particularly to see its condition?
- A. I went to see if there were any holes in it.
- Q. Did you go for that purpose?
- A. I went for that purpose, yes, sir.
- Q. You thought there might be a hole in it and you wanted to know?
- A. I knew there was no hole when we hauled it up, but in
- 317 hauling it up and denting it, I thought there might be a hole made in it.
- Q. You first tried the port hand pump?
- A. Yes, sir.
- Q. That did not work satisfactorily?
- A. It would hold water but worked hard.
- Q. It was not in satisfactory condition to work?
- A. It worked all right, held water, it did not hold as much as the starboard pump, and did not work so easy; we could pump longer than on the port pump.
- Q. Why did you stop using the port hand pump?
- A. Because it worked hard.
- Q. And it did not throw as much water as the starboard pump, is that it?
- A. That is what I found out afterwards. I did not know until I tried them.
- Q. Then when you started to work the starboard pump, that was choked?
- A. After we had been using it a while it got choked.
- Q. How long had you been using it?
- A. About a couple of hours.
- Q. Why didn't you go back to the port pump then?
- A. Because I wanted to see what the trouble was with this one.
- Q. You preferred to use the starboard pump, if you could?
- A. I wanted to see what ailed it.
- Q. You didn't think you could use the port pump very well?
- A. We could use it.

Q. But you thought it would be better to get the starboard pump up?

A. Yes, sir, I wanted to see what the trouble was in case the other pump gave out.

Q. Now you made a protest in New York after you came in, didn't you?

A. Yes, sir.

Original protest produced at request of Mr. Englar and marked Exhibit A.

318 Q. Will you identify this as the original protest that you signed when you came into New York?

A. Yes, I think that is my signature, it looks like it.

Q. You did not say anything in the protest about this shock that the engineer heard, did you?

A. No, sir, not that I know of.

Q. And if you had supposed that was the cause of losing your vessel, you would have mentioned it, wouldn't you?

A. Well, I don't know, I didn't think much about it. We have those shocks aboard the vessels. Probably it slipped my mind.

Q. When you made this protest you didn't think at that time that that was the cause of losing your vessel, did you?

A. I had in mind something of that sort, because the vessel was perfectly solid in every other way, and such things had happened to me before in my sea time; I had in mind something of that kind might have happened.

Q. But it was not in your mind sufficiently at the time you made the protest to mention it?

A. It slipped my mind. If I had had the log book, I would have had it in mind to look at.

Q. This shock had slipped your mind then at the time you made this protest?

A. I didn't feel the shock.

Q. And you did not attach much importance to what the engineer said to you?

A. I kind of mistrusted something like that with the amount of water there was and gaining on her so quickly.

Q. But you said nothing about it in the protest?

A. No, sir, not to my knowledge.

Q. The weather you encountered was not sufficient to cause you to lose your vessel, was it?

A. Yes, the weather was pretty bad.

Q. Your protest does not show the weather was very bad.

319 A. There was a good amount of water shipping around her and things like that, wrenching and straining in the sea.

Q. You don't claim you encountered any extraordinary weather, do you?

A. It was pretty heavy weather for the time of year.

Q. Do you claim you encountered any extraordinary weather at that time?

A. Bad weather.

Q. I am using the word "extraordinary."

A. Extraordinary bad weather—some call it extraordinary bad weather, and some would not.

Q. Do you testify here today it was extraordinary bad weather?

A. I testify it was extraordinary bad weather for the time of year.

Q. I want to get your testimony. You now swear under oath that this was extraordinary bad weather?

A. Yes sir, extraordinary bad weather for the time of year.

Q. I don't care now about the time of year. What I want to know is about the weather. It was extraordinary bad weather?

A. Yes.

Q. You are familiar with the scale of wind, are you not?

A. Yes, sir.

Q. And extraordinary bad weather, that is a storm or a hurricane?

A. No sir, you could not call it a hurricane, kind of an ordinary bad storm we would call it generally.

Q. Now Captain, do you testify you had what you call a storm?

A. I had what I call a storm, the wind blows about forty miles an hour in a storm; in a hurricane it blows about seventy or eighty.

Q. Will you testify then that you had about a forty mile wind?

A. About thirty or forty mile wind.

Q. You don't claim that that is a remarkable thing to encounter at sea, do you?

A. Not so very remarkable. It is a sea that kicks up, kicks up a bad sea in the Gulf Stream.

320 Q. When you go to sea from New York to Porto Rico, you anticipate encountering thirty to forty miles of wind, don't you?

A. Yes, sir.

Q. So that this weather while you call it bad weather, it was not weather that was really extraordinary to encounter in the Gulf Stream, was it?

A. Yes, sir.

Q. You say it is extraordinary?

A. In the Gulf Stream it is extraordinary bad weather for the time of year.

Q. But no matter what time of year you go to sea, Captain, you may encounter a heavy gale of wind?

A. Yes, sir.

Q. You don't call it extraordinary, do you, if you encounter a heavy gale of wind?

A. A common gale of wind we call it.

Q. This was not more than a common gale of wind?

A. A common gale of wind and kicked up a bad sea, a cross, choppy sea.

Q. Really all the pumping that amounted to anything that was done on your boat was done by this messenger pump. Isn't that right?

A. The messenger and circulating pump.

Q. That circulating pump is a small pump for washing down decks, isn't it?

A. Washing down decks and filling the boiler and pumping out water in the hold.

Q. It is a small pump compared to the other pump?

A. It is a small pump compared to the wrecking pump.

Q. And compared to the messenger pumps too?

A. Yes.

Q. You say Captain, that this messenger pump throws a couple of gallons of water at each stroke?

A. About that.

Q. That is about what you saw coming on deck?

321 A. That is about what I estimated coming out on deck and what I should judge, about a couple of gallons a stroke.

Q. It is a double pump, is it?

A. Two pumps going with a crank shaft.

Q. And a plunger in each pump?

A. Yes, sir.

Q. One plunger goes down and the other comes up?

A. Yes, sir, it goes on a crank shaft.

Q. Captain, if you had had plenty of time to inspect this vessel, before you went to sea, don't you think you would have had her in a little better shape than you did?

A. No sir, I don't think I could. Everything looked to me in apple pie order and good condition.

Q. But of course, you didn't know much about the engine room equipment, did you?

A. No, sir.

Q. Do you know who packed this pump that was packed?

A. The engineer.

Q. Did you see him packing it?

A. I saw him packing it. That is his business to do it when a pump is packed.

Q. Do you remember seeing him packing it?

A. I saw him with the plunger out and the packing.

Q. Do you know what he packed it with?

A. I asked him if he had packing for his pump and he said he had plenty of it.

Mr. Englar: I move to strike out the answer as not responsive.

Q. Do you know what he packed it with?

A. No sir, there was packing there that they have for the purpose.

Q. Do you know anything about it?

A. Yes sir, I had a piece in my hand. There are two kinds, hemp packing and rubber packing, kind of square packing to go in those plungers.

Q. What did he have?

A. Hemp packing.

322 Q. What did it look like?

A. It was hemp packing about one inch square, something like that, that is what they use. When he said hemp packing, I knew pretty nearly what he meant.

Q. Did you personall/y see what he put in this pump?

A. I saw what he had in his hand. I supposed it was and it looked to me like all hemp packing does, it is made expressly for pumps.

Q. You personally saw this yourself?

A. I saw it in his hand. I suppose it is the same as any packing. I know what he had in his hand.

Q. Was it a Russell pump?

A. Yes sir, a Russell pump.

Q. Captain, if your wrecking pump had been working, don't you think you could have gotten this vessel to port?

A. I have no doubt we would have got to port if it had been smoother water, if the wrecking pump and the other pumps were working at the time. I don't know how much those wrecking pumps would heave.

Redirect examination.

Questions by Mr. Gulliver:

Q. Captain, what became of the log book?

A. The log book went down with the vessel.

Q. What was it that stopped you from using the hand pumps?

A. Because we could not work them then after my crew left me.

Q. I mean before your crew left you?

A. Because it was so rough we could not stay there to work them.

At request of Mr. Englar, original protest dated August 10, 1910, marked Exhibit A for identification.

Signing of deposition waived.

EDWARD J. CONNOR,
Notary Public.

323

Deposition of William Holm.

United States District Court for the Southern District of New York.

BENNER LINE
against
FIELD S. PENDLETON.

Deposition of Witness William Holm, Taken by Consent, under the Same Stipulation as Heretofore, at the Office of Respondent's Proctor, August 4th, 1913.

Present:

Messrs. Harrington, Bigham & Englar.

Mr. Englar for Libellant.

Mr. Goodrich, for Respondent.

WILLIAM HOLM, witness on behalf of the respondents, being duly sworn, testified as follows:

Direct examination by Mr. Goodrich:

Q. How old are you?

A. Twenty-four.

Q. How long have you followed the sea?

A. Eight years.

Q. What position do you occupy on board vessels?

A. Engineer on board schooners.

Q. Were you on the "Edith Olcott" in July, 1910?

A. Yes, sir.

Q. Had you ever before that time sailed on any vessel in which Mr. Pendleton was owner or for which he was agent?

A. None that I know of.

Q. Have you been on any of his vessels since?

A. Yes, I was on the "Pendleton Sisters" about a month ago.

Q. Is that the only vessel of Mr. Pendleton's on which
324 you have sailed?

A. So far as I know it is.

Q. Where did you join the "Edith Olcott"?

A. I joined her at Perth Amboy.

Q. Did you go with her on the trip on which she was lost?

A. No, sir, I did not.

Q. How long were you with her master?

A. Between sixteen or seventeen days.

Q. Why did you not go with the vessel?

A. I fell out with the mate and captain.

Q. Over what did you fall out?

A. About getting some coal on board.

Q. Did they order you to do something which you refused to do?

A. Yes, sir. They wanted me to carry some coal on board from the wharf and I would not do it.

Q. That was after the vessel had reached the wharf in the East River?

A. Yes, sir.

Q. What was the name of the mate?

A. Bellmast.

Q. What was the name of the master?

A. Fletcher.

Q. When you joined the vessel at Perth Amboy who were on board of her at that time?

A. The captain and the cook.

Q. Where did the mate join her?

A. In Black Tom.

Q. Tell what you did when you went on board with reference to the machinery on the vessel.

A. I overhauled everything. I washed out the boiler and put handhold gaskets in and filled the boiler up with water.

Q. Did you examine the pumps?

A. I overhauled the steam pump.

Q. What was the condition of the steam pump?

A. First class condition.

Q. Were there any evidence upon the boiler of foaming?
325

A. No.

Q. Did you go down into the inside of the hold?

A. Yes, sir, I went down there.

Q. What part of the ship?

A. The forward part.

Q. What was the condition of things there?

A. First class.

Q. See any signs of leaks?

A. No, sir.

Q. Did you examine the pipe from the steam pump?

A. Yes, that was what I went down there for.

Q. What was its condition?

A. First class condition.

Q. Was there any cargo in the vessel when she was at Perth Amboy?

A. No, sir, she was in drydock there.

Q. Did you join her while she was in drydock?

A. She came out of drydock the day before I went on board of her.

Q. Did she go to Black Tom, New Jersey?

A. Yes, sir.

Q. And did she there take on a load?

A. About a half load of cement.

Q. As the cement was laid in her, was she on an even keel, or on the head or on the stern?

A. She was on about an even keel.

Q. Did you use the steam pumps on her during the sixteen or seventeen days you were on her?

A. I used the steam pump once.

Q. Where were you lying?

A. It was while we were going to Black Tom, from Pier 11 East River.

Q. How long did you pump?

A. About three or four minutes.

Q. And did the pump suck?

A. Yes, sir.

326 Q. Did you pump her again with the steam pump while you were on board?

A. No. When we were over here they laid the vessel by the stern to get her stern down.

Q. While she was here stern down was she pumped by hand?

A. Yes, sir.

Q. Who did it?

A. The mate and cook.

Q. How long did they pump?

A. I do not know. It might have been four or five minutes or more.

Q. How often were the hand pumps used?

A. Twice.

Q. And where was the vessel at those times?

A. Pier 11 East River.

Q. Were the hand pumps used at all while she was at Black Tom?

A. No.

Q. Was the vessel by the stern at the time of the using of the hand pumps?

A. Yes, that is why they used the hand pumps. They could not use the steam pumps.

Q. Did these hand pumps suck?

A. Yes, sir.

Q. Where was the vessel when you had the trouble with the mate about the coal?

A. Pier 11, East River.

Q. Did you intend to go with the vessel?

A. Yes, sir.

Q. And what was the reason you did not go?

A. On account of falling out with the mate.

Q. Did you see any trouble at the wharf the day she sailed?

A. Yes, I saw them trying to take the crew off after the shipping master had shipped them aboard.

Q. Who was trying to do it?

A. Union sailors.

Q. Did you recognize any of them?

A. I recognized two.

327 Q. What were their names?

A. One was a delegate, Mike Spurvey.

Q. Who was the other one?

A. A fellow they call Happy Hooligan.

Q. Do you know where Hooligan is now?

A. I heard he is in the penitentiary.

Mr. Englar: I do not see how this evidence bears upon the matter, and I object to it on the ground of being incompetent, irrelevant and immaterial.

Q. Did you see a man jump into the water and try to swim to the boat?

A. Yes, Happy Hooligan.

Mr. Englar: It is understood that all testimony relating to what occurred before the boat sailed is taken subject to the objection as above entered.

Q. Did you have a force pump in addition to the steam and hand pumps?

A. Yes, sir.

Q. Did you use that at all?

A. Yes, sir, for washing down the decks. We used to wet the vessel down every night.

Q. To what use could the force pump be put?

A. There was a 3-inch pipe going down into the hold. In case the steam pump broke down we could use that for pumping out the hold.

Q. What else?

A. For a circulating pump.

Q. That is for your condenser, and for what else?

A. For washing down decks.

Q. What was the condition of the force pump?

A. First class condition.

Q. During the time you were with the vessel that pump was only used for the decks?

A. Only for the decks.

328 Q. It was in good order?

A. Yes, sir.

Q. What have you to say as to the engine pump equipment for the vessel?

A. Plenty of packing and tools and anything you wanted in first class shape.

Q. Was she what you would call a dry vessel or a leaky vessel?

A. She was not a leaky vessel.

Q. What have you to say as to whether she was a good vessel or not?

A. I think she was one of the best vessels I was ever in.

Q. Well built?

A. Yes, sir.

Q. In good repair?

A. Yes, sir.

Q. And well found?

A. Yes, sir.

Q. What did you do to the boiler when you went on board?

A. I washed the boiler out.

Q. Did you see any signs of soot around the boiler?

A. No.

Q. What did you do with the machinery?

A. Put in gaskets in the handholes.

Q. What have you to say about the size of this boiler?

A. A large size boiler for a vessel of that sort.

Cross-examined by Mr. Englar:

Q. How old were you at the time you were on the "Edith Oleott?"

A. Twenty-one.

Q. How long had you been acting as engineer?

A. About three years.

Q. About three years?

A. Yes, sir.

Q. Had you had any experience in a machine shop?

A. I had a little.

Q. How much?

A. About a year or so.

Q. Did you have anything to do with pumps while you were in the machine shop?

A. Yes, sir.

329 Q. What sort of a shop was it?

A. A repair shop.

Q. A repair shop?

A. Yes, sir.

Q. For what vessels?

A. For vessels made in Halifax, Nova Scotia.

Q. Whose shop was it?

A. I do not remember his name.

Q. Do you mean to tell us that you were engaged in repairing pumps?

A. Helping.

Q. But you did not repair many pumps?

A. Not so very many.

Q. How many did you help to repair?

A. I could not tell. I did not count them.

Q. Were you working in the machine shop?

A. I was helping in it.

Q. Well you did not repair more than a couple of pumps?

A. Probably three or four; that is helping.

Q. That is all the mechanical experience you had, outside of what you picked up at sea?

A. Yes, that is all.

Q. Did you ship as engineer on boats before you were of age?

A. Yes.

Q. You started to ship as engineer when you were about 18 years old?

A. Yes.

Q. On what kind of vessels?

A. Schooners.

Q. Along the American coast?

A. Yes.

Q. You said to Mr. Goodrich that you overhauled everything. What did you mean by that?

— I overhauled the things that were not right and fixed a leaky valve.

Q. What was it that did not look right?

A. I put new springs on the circulating pumps.

Q. Any other pump?

A. No, that is the only one that had springs on.

330 Q. The rest of the pumps were all right?

A. Working all right.

Q. Now, as a matter of fact, what you did in the way of overhauling was to take up the circulating pump and put new springs in and wash out the boiler, and put in handhold gaskets. Now, that is all the overhauling you thought was needed?

A. That is all, because I think there was a man looking over things before I came on board.

Q. That is, while she was on drydock?

A. No.

Mr. Englar: I move to strike out what the witness says was done before he got on board as not responsive, incompetent, irrelevant, immaterial and hearsay evidence.

Q. Now when the hand pumps were being used, were you standing there taking out any water?

A. No, I was forward.

Q. You were forward?

A. Yes.

Q. You were practically the length of the vessel away?

A. I went aft to help them, yes.

Q. There were two of them there already, and when you got there there was three?

A. They said it was not necessary.

Q. Did they call you?

A. No, I went there myself.

Q. What led you to go?

A. Well there was nobody on board but me, the mate and cook.

Q. The mate and cook were back there and you went back to help them?

A. Yes.

Q. By the time you got there they had the pump sucking?

A. Yes.

Q. What boat are you on now?

A. The "Mary E. H. G. Dowd."

331 Q. Are you sailing on her now?

A. Yes.

Q. Do you know who owns her?

A. Mr. Pendleton.

Q. Mr. Pendleton?

A. Yes.

Q. What vessel were you on the trip before this?

A. The "Pendleton Sisters."

Q. He owns her?

A. Yes, or is agent for her.

Q. When you went on the ship you understood that somebody had been looking over those pumps, did you not?

A. I thought there was.

Q. That was your understanding?

A. Yes.

Q. When you speak of the steam pump, what pump is that you mean?

A. The wrecking pump.

Q. The wrecking pump?

A. Yes.

Q. Did you try the messenger pump?

A. No, I did not try that.

Q. You did not have any occasion to use that?

A. No. The vessel was not leaking.

Q. You were about twenty-one years old at that time?

A. Twenty-one.

Q. And you had about three years' experience as engineer?

A. Yes.

Q. But you had not been going continuously as engineer during those three years?

A. Yes.

Q. Had you been continuously at sea?

A. Yes.

Q. Were not there any periods that you were ashore?

A. Only stayed on shore eight days at a time.

Q. Didn't you ever ship as a sailor during that time?

A. I only went before the mast two or three times in my life.

332 *Testimony of Respondents Taken in Court at Trial.*

WILLIAM TRAVIS, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. What is your full name?

A. My name is Thomas William Travis.

Q. What is your business?

A. I am employed as solicitor for Tietjen & Lang Drydock, and looking after their business in New York.

Q. How long have you done so?

A. 23 years.

Q. You have been master of a vessel?

A. Not master, no, sir.

Q. In what capacity have you sailed?

A. I used to go to sea when I was young, before the mast.

Q. And are you familiar with the construction and the need of repairs and the general condition of wooden vessels?

A. I am, yes, sir.

Q. And you have been at that business for——

A. 45 years.

Q. Now do you remember the schooner Edith Olcott?

A. Yes, sir.

Q. How long have you known her?

A. Since she was new.

Q. She was new in 1890?

A. 1890.

Q. And have you been familiar with her since that time?

A. All the time up to 1907, yes, sir.

Q. Did she come to your dock very frequently?

A. She generally come once and sometimes twice a year.

333 Q. While she was under the ownership of owners prior to Mr. Pendleton's purchase, what sort of care was taken of her?

A. She was always kept up in fine shape; one of the best taken care of vessels on our coast.

Q. Do you remember her being at your place in November, 1907—going there on November 23rd and remaining there until January 4, 1908?

A. Yes, sir.

Q. Will you state whether the vessel was on the dock at that time?

A. How, sir?

Q. Was the vessel on the dock at that time?

A. She was.

Q. So that she could be examined as to her bottom and all parts at that time?

A. Yes, sir.

Q. What was done to her there?

A. We recaulked her bottom, her top sides, her bulwark, her main deck, her poop deck; we overhauled; we caulked all the seams in her top deck, wood end and waterway; we put in new hatch coaming and new stanchions between deck and the lower hold, and a general repair from her garboard to her masthead—what you call a general repair.

Q. General repair or general overhauling?

A. General overhauling, yes, sir.

Q. Did you receive specific directions from the owners or the master what to do, or were you told to do what was necessary?

A. No, sir; we took orders from the captain, the man that we was told to take orders from; whatever he said to be done to do.

Q. Did you see the vessel from day to day and were you familiar with the progress of the work?

A. Every day, yes, sir.

Q. At the end of the time of the repairs in what condition was she?

A. She was in as good condition as any vessel could be; she couldn't be any better.

334 Q. And when she left your yard she was in a seaworthy condition, was she?

A. Yes, sir.

Q. What have you to say about the vessel in general, her cargo and condition during the time that you have known her?

A. All the time that I have known her, from 1907, when she was to our dock any time from once to twice a year and we overhauled and done her work, we considered her, sir, one of the best vessels on the coast; couldn't be any better.

Q. What was the amount of the bill that was paid for the general overhauling?

A. \$3,551.70.

The bill referred to is marked for identification Exhibit F.

No cross-examination.

Adjourned until 2 P. M.

2 P. M., After Recess.

JOSEPH W. PROCTOR, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Captain Proctor, how old are you?

A. 54.

Q. And what is your business?

A. Surveyor.

Q. How long have you been such?

A. 12 years.

Q. Have you been to sea?

A. Yes, sir.

Q. And in what capacity?

A. All capacities, from boy to master, in sail and steamships.

Q. Are you now the head of the American Bureau of Shipping?

A. Not the head, no, sir; I am the inspector of the American Bureau of Shipping.

335 Q. What is the business of that Bureau?

A. It is to inspect and classify ships.

Q. Inspect and classify for what purpose?

A. For underwriting, for insurance purposes.

Q. And for chartering?

A. For chartering.

Q. And you have a number of subscribers to your Bureau, have you not?

A. Yes, sir.

Q. And to such persons you furnish the results of your examinations of vessels?

A. Yes, sir.

Q. Do you confine yourself to American vessels?

A. No, sir.

Q. Now are you in charge of the inspections?

A. Of wooden vessels, yes, sir.

Q. Of wooden vessels. Did you have an associate with you, or someone associated with you in your work?

A. My last associate was Captain N. H. Rich; he is dead now.

Q. When did he die?

A. He died a year ago last February.

Q. Have you been called on in your capacity of inspector to the American Bureau to inspect the Edith Olcott?

A. Yes, sir.

Q. How long have you known her?

A. Well, I have known the vessel all her life; but I was called upon first to inspect her for classification in September, 1905.

Q. Now, during the time that you have known the vessel what have you to say in general about her condition as to seaworthiness and upkeep?

A. First class.

Q. She was built in 1890, was she not?

A. 1890.

Q. Have you brought with you some records of inspection of her from 1905 down?

A. Yes, sir.

336 Q. I show you a book entitled Inspector's Reports, Am. B. of S., having on the outside, October 1904--October 1905; will you kindly look at page 137 of that book and thus refreshing your recollection, tell me what you did in regard to inspecting the Edith Olcott, and what you found?

A. Well, I reclassified her at that time.

Q. What do you mean by reclassifying her?

A. Well, when the vessel is first built we have our surveyor, at Bath, for instance, send us a report of the size and kind of all the material that is used in the building of the vessel; and we have different classes; for instance we class a vessel for 10, 12, 14 or 15 years as the case may be; 15 years is the highest class we give to a wooden vessel.

Q. Now her class, of lasting for 15 years, expired, did it not, in 1905?

A. Yes, sir.

Q. And it was for the purpose of reclassification that you examined her?

A. Yes, sir.

Q. Kindly tell what you did and what was the result of it?

A. I opened the vessel under the counters, took out a piece of the planking under the counters to see the inside of the vessel; her stern frame; under the bow the same; took out the bow ports to examine the apron, stem, &c. Opened all the listings inside—listings are strakes cut in the ceiling to examine the ship inside; those were all opened and examined, and wherever it was impossible to see the frames I bored through the ceiling into the frame; my purpose was to examine the vessel thoroughly throughout and find out if there was any decayed wood in her.

Q. What have you to say as to the thoroughness of the examination made by your Bureau as compared with the examination made by an inspector for an Insurance Company?

A. Well, an inspector for an insurance company would only make a mental, that is a superficial examination to get a mental impression of the vessel.

Q. Where was the vessel when you saw her in 1905?

A. At Perth Amboy drydock.

Q. Will you please tell, refreshing your recollection if you so desire, from your report, anything further that you did at that time and what was the result of it?

A. Yes, sir; I strengthened the centre line of the vessel—that is I instructed the strengthening of the centre line.

Q. You mean you directed that that be done?

A. Yes, sir. And that called for an assistant keelsons, and the fastening of the keel, &c., at that time, which was done; I directed that several strakes of new ceilings should be put in the vessel in the lower hold, and outside of that I bored the beams, directed the boring of the beams, and the examination of the pumps, the examination of the windlass and all the anchor gear, the steering gear, sails, spars, rigging, &c. To go over the vessel and assure myself that she was in first class condition.

Q. As a result of that examination what did you do with her class?

A. We gave a new class for six years.

Q. From what date?

A. From September—this is issued in September, but it dated from June of that year.

Q. What class did you give her?

A. A-1.

Q. Could any higher class have been given to a vessel of her age?

A. No.

Q. Now before passing on the subsequent examinations of
338 the vessel, what have you to say as to the vessel in general as
to the way she was kept up and the sort of attention she re-
ceived?

A. First class, above the average.

Q. Did your examination of 1905 involve the pumps as well as all
other parts of the boat?

A. Yes, sir, always.

Q. And as the result of it you gave, as you say, a six-year exten-
sion from June, 1905; that would expire in June, 1911?

A. Yes, sir.

Q. Now, will you look at your memorandum of this and tell us
about what was done, if you know, in regard to the pumps through-
out the vessel?

A. Well, I remember what was done with the pumps, that is the
pipe.

Q. Please tell us.

A. Her suction pipes to her wrecking pumps was boxed in on top
of the assistant keelson, alongside of the main keelson, in order to
put the assistant keelsons on, all that piping, everything was taken
off; the pipes went down through the assistant keelson, and that all
had to be taken out in order to put in the assistant keelsons.

Q. When was the next examination that you made of her? A.
I hand you your book entitled October 20, 1906, to December
3, 1908; it is on page 36. Did you examine her on November 27,
1907?

A. No, sir, this is in January; this entry is in January, 1907, and
it is in the handwriting of my associate.

Q. Captain Rich?

A. Yes, sir.

Q. Are you in the custody of those records?

A. Yes, sir.

Q. And you know the handwriting of Captain Rich?

A. Yes, sir.

Q. What does the examination of her at that time disclose?

339 Mr. Englar: May I see it?

Mr. Goodrich: Certainly.

Q. Will you please describe what was done to her at that time?

Mr. Englar: It doesn't seem to me, your Honor, that that is quite
the proper way to put it; I don't object to the entry being admitted.

Mr. Goodrich: Rich is dead.

Q. Is the entry in your book that you have just been examining
as follows: "Four master Edith Olcott, 1,146 tons, Captain Harris,
on dock at Tietjen & Lang; caulked garboards, pried bottom

caulking, found good for a year, and painted bottom"; this entry being under date of January 15, 1907?

A. Yes, sir.

Q. There was nothing in that entry nor the examination which terminated in the entry to lead you to change the classification of the Edith Olcott in any way?

A. No.

Q. Will you kindly turn to page 168, November 27, 1907, and describe what was done, the inspection of the work and the result?

A. This is in Captain Rich's handwriting, too.

Mr. Englar: May I see it again?

Mr. Goodrich: Certainly.

Q. This is in Captain Rich's handwriting and the entry is as follows: "Nov. 27, 1907, four-master Edith Olcott, 985 tons, of New York, Captain Harris; on dock at Tietjen & Lang; caulked from keel to deck; cemented seams in bottom and painted; searched deck, caulking repairs to between deck hatches; caulked main deck
340 in foremast and topmast; overhauled rigging on same."

And in the margin of it "P. S., New engine"; in pencil on the margin "Certificate endorsed." What does the pencil memorandum "Certificate endorsed" mean?

A. That is from our office; the certificate is sent in to the office to have that endorsed, so any time she is away from New York, or in a foreign port, they can show that as evidence of the vessel being caulked and put in first class condition.

Q. And retaining her class?

A. And retaining her class. But if they should happen to charter a vessel for a foreign port they can show that as evidence of the vessel being in good condition.

Q. I show you a paper marked Exhibit F for identification, being Tietjen & Lang's drydock bill of January 4, 1908. Is this the bill, can you tell, for the repairs that were done to the vessel at that time?

A. Well, now there are many things in that bill that it would be hard for me to identify; in a general way I could probably identify them; I have nothing to do with them, my duty is to go on board of the vessel and see that everything is put in first class condition about the vessel; when that work is done I usually make a point of being there and seeing that what I have recommended has been done, that the vessel has been put in first-class condition.

Q. Would you think that your recommendations would cost about \$3,500?

A. Captain Rich recommended that.

Q. Based on this examination of Captain Rich's, concerning which you have just testified, what was done with her class?

A. It was confirmed.

Q. Confirmed and continued?

A. Yes, sir.

341 Q. Now that meant that she was worthy of her classification still?

A. That meant that she was worthy of her classification still.

Q. Will you turn to the next entry, page 288; that is again in Captain Rich's handwriting, is it not?

A. Yes.

Q. I will read it in the minutes: "Oct. 22, 1908, four-master Edith Olcott, 985 tons, of New York, Captain Harris, on dock at Perth Amboy Drydock Co., cleaned and painted bottom and small repairs around deck; one new hawse pipe." Was there anything as the result of that work to cause her class to be lessened?

A. No, sir.

Q. Was her class continued and confirmed?

A. Her class was continued and confirmed.

Q. I next show you Inspector's Reports, December, 1908, to September, 1911; will you turn to page 84, the date of August, 1909, and tell me who made the inspection there reported?

A. I made that one.

Q. Kindly tell what was done?

A. "On dock at Perth Amboy; searched the bottom, caulking, cleaned and painted; painted the bottom; new mizzen topmast, cross and trestle trees; overhauled rigging and general overhauling."

Q. What is implied in "general overhauling?"

A. That is going over the vessel and looking her over generally; little things that may happen in the wear and tear of the vessel; as I remember, a couple of hatch beams had become pressed down, or sprung—anything in the ordinary wear and tear of the vessel which showed any defect was remedied.

Q. Does a general overhauling include the examination of her pumps and suction pipes to see what condition they are in?

A. Yes, sir.

342 Q. And as a result of that examination as to which you have just testified, what was done with her class?

A. Confirmed and continued as before.

Q. Will you turn to page 126 of your book. Is that your examination or Captain Rich's?

A. That is Captain Rich's.

Q. Does it read as follows: "Four-master Edith Olcott, 945 tons, of N. Y., Captain Harris, Perth Amboy Drydock Company; spliced mizzen mast, overhauled rigging and several small jobs"?

A. Yes.

Q. As a result of that what was done with her class?

A. Confirmed and continued. That was December, 1909.

Q. Will you turn to page 179 of the book; in whose handwriting is the report of the inspection?

A. It is in my handwriting.

Q. Did you make the inspection?

A. I did.

Q. What is the date of it?

A. July 13, 1910.

Q. And the vessel was lost within about a month after that, was she not?

A. In less than a month after that.

Q. What was done to her at that time?

A. She was taken on dock and her caulking searched and bottom painted and the vessel looked over.

Q. Whom did you meet there?

A. I met the Atlantic inspector, Mr. Waters, and Captain Hoyt.

Q. Is Mr. Waters alive now?

A. No.

Q. You met Mr. Hoyt on the vessel, who is here?

A. Yes.

Q. Meet any of the other inspectors; did you meet Captain Fletcher?

A. I met Captain Fletcher.

343 Q. As a result of that examination what was done to the class of the vessel?

A. Confirmed and continued.

Q. Now what have you to say as to the seaworthiness of the Edith Olcott at the time that you saw her in July, 1910, her seaworthiness in every particular?

A. First class.

Q. You remember meeting Captain Fletcher there?

A. I do.

Q. And you remember going over the vessel with him?

A. Yes, sir.

Q. How long were you there; do you remember?

A. No, sir, I can't remember that; I was probably around the vessel from an hour to two hours, something of that kind.

Q. Did you know what cargo she was to carry at that time?

A. General cargo for Porto Rico.

Q. Was there any cement in it?

A. I didn't know at the time I examined her, but I did know afterwards; I had occasion to look the vessel over after she went to Pier 11, to see that the work I had recommended had been done.

Q. Do you remember examining her deck and the waterways on deck?

A. Yes, sir.

Q. What was their condition?

A. Good.

Q. Do you remember examining in the well?

A. Yes, sir.

Q. What was the condition of the deck there?

A. I found some of the cross seams around the hatches and in the forward part of the poop bulkhead was a little soft, and recommended that it be caulked, and went to Pier 11 to see that it had been done.

Q. You found it had been done?

A. I found the work I had recommended had been done.

344 Q. Do you remember looking along the keel of the vessel as she lay on the Perth Amboy dock?

A. I always did that.

Q. What do you have to say as to her straightness?

A. She was exceptionally straight on her keel.

Q. What does that mean?

A. Well it means a first class vessel at least; it is very rarely you see one as straight as she was on her keel.

Q. Are you willing to say that she was an exceptionally good vessel for her years?

A. Exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost.

Q. Was she capable of receiving in your Bureau any higher classification than she did?

A. No?

Q. You remember she was under charter at this time to go to Porto Rico?

A. Yes, sir.

Q. Will you describe what is done in your office in regard to handing out information; how it is handed out, and what information is handed out to persons entitled to have it?

A. Well with this particular vessel, when she comes up for charter the charterers usually go to the Insurance Companies to see if she will be accepted, and the Insurance Companies come to our office to know what has been done to the vessel, to get the records of the vessel, the condition of the vessel and what has been done to her; and if they have any doubt as to the vessel in any way one of the inspectors goes and looks her over, makes an examination of her; that is with the purpose of more particularly—not so much for the hull, but for the anchors, sails, rigging, steering gear, &c., the working parts of the vessel.

Q. In the case of the Edith Olcott, what information was
345 given out from your office?

A. That she was first class, always.

Q. Captain, the testimony is that in this case the vessel's well was sounded at the close of the day on July 30th, being Saturday; sounded again on Sunday morning and on Sunday night; Monday morning, August first, and Monday night; Tuesday morning and Tuesday night, and no water was found in her; that when she was sounded at eight o'clock on the morning of Wednesday, the 3d, there was found either 4 ft., or between 3 and 4 ft. of water in her hold; having in mind the condition of her butts and seams, the condition of the vessel in general, what do you think could have happened to her which would cause 4 ft. of water to come in during the night of August 2d?

Mr. Englar: That seems to me objectionable, as highly speculative; I don't press the objection, but if your Honor cares to take it I shan't press it.

Objection overruled.

Exception.

Q. I should add to the question that I have put to you that the weather was not severe until Tuesday night, and then there was some bad weather; but on Saturday, Sunday, Monday and up to the night of Tuesday the weather was not bad?

A. I would hardly think that the weather had anything to do with it at all.

Q. Well, what could happen that would explain it?

A. I think the vessel must have struck a submerged wreck, or something of that kind at sea.

Q. Have you had any experience of that sort yourself?

A. I have.

346 Q. Did you know at the time that you had struck something?

A. No, sir.

Q. When did you discover it afterwards?

A. When I arrived in the Island of St. Croix and discharged the vessel.

Q. Do you know from your own experience at sea and from reports that have been made to you professionally that there are many obstructions which vessels strike in the night when they cannot be seen?

A. Well, there are so many, and so different, that it seems impossible—it is hard to explain them; I have known such cases.

Q. Both in your own experience and from reports made to you professionally?

A. As an inspector, yes, sir.

Q. In your own case you say that you didn't know at all that you had struck anything?

A. No, sir, the vessel started to leak.

Q. Is that your explanation of what must have happened to the Edith Olcott under the circumstances about which I have told you?

A. I cannot imagine anything else; the Edith Olcott never had been stranded, and never had any unequal or unnecessary strains put on her bottom, and I can't imagine anything happening to the vessel's bottom; she certainly never showed it at any time, that she was weak on her bottom at all.

Q. What have you to say as to the outfit of pumps upon the Edith Olcott compared with vessels of her size on the coast?

A. She had more pumps, above the average, more than the ordinary vessel has.

Q. And from your examination of the pumps made from time to time, as you have testified, what have you to say as to the condition of the pumps and all their parts just before she went
347 to sea in July, 1910?

A. At the time I went to Perth Amboy I didn't strip the pipes to see the condition they were in, but I examined the pumps, and examined them carefully, and from what I learned from the mate and Captain Fletcher, and the engineer, &c., I had every reason to believe that her pumps were in good working order.

Q. Could the starboard suction pipe have been corroded and full of holes at that time, the starboard hand pump?

A. As I say, I didn't examine that; no, I don't think it could have been.

Q. Was the pump tried in your presence?

A. Not the hand-pump, no; as she had auxiliary machine pumps to work her with I paid little attention to the hand-pumps.

Q. Captain, could you tell from the condition of the vessel's bot-

tom whether she had ever been stranded, or met with a disaster that injured her bottom?

A. No, sir, she never had; she had her original wood in her bottom.

Cross-examined by Mr. Englar:

Q. Captain Proctor, will your Bureau class a wooden sailing vessel without hand-pumps?

A. Without hand-pumps?

Q. Yes.

A. Well, that would be owing to the auxiliary pumps that she had about her; it would be unnecessary for us to class her, because the law calls for hand-pumps; she must have them.

Q. I am confining you to the rule of your Bureau; under your rules can you class a wooden sailing vessel without hand-pumps?

A. No, sir.

348 Q. In Mr. Goodrich's question, Captain, it was stated that there was no water in the vessel until Wednesday morning; now a schooner always has a certain amount of water in the bilges?

A. Usually.

Q. When you pump her out you don't pump out the last six inches of water?

A. There is always some water lying in there.

Q. At any time you will get a sounding of 6 or 8 inches?

A. Not necessarily.

Q. That will depend on how far the suction pipes go down?

A. You sound through the centre of the vessel, and if the vessel is canted over the water runs into the bilges and you don't get any water at all.

Q. The sounding pumps are usually aft?

A. Not necessarily.

Q. In this vessel they were, the soundings were taken aft, and if the vessel was by the stern you would probably get at any time a sounding of 6 or 8 inches of water, wouldn't you?

A. No, I wouldn't say 6 or 8 inches in sounding.

Q. Well, there would be that much water down in the bilges?

A. No, not if the vessel was tight.

Q. Any vessel will leak a little?

A. No, I wouldn't say that.

Q. Even a wooden vessel might not leak at all?

A. In fine weather.

Q. But as a general rule you do find anywhere from 6 to 10 inches of water in the bottom of a wooden schooner?

A. Not 10; in the average vessel you might find 6 inches.

Q. And the timbers in the bottom of a vessel, say a vessel like this, that is, from the very bottom of the sounding well to the top of her timbers, what would be that distance?

A. 15 inches.

349 Q. Wouldn't there be more than that?

A. I think it was 15, I am not sure; I have it in my pocket.

Q. Suppose you give us the dimensions of the vessel accurately;

you might just give them to us, I don't know that they are in the record.

A. I have them here: They were 13 by 15; 15 inches high.

Q. Aren't there floors on top of that?

A. No, the floor ceiling.

Q. How thick is that?

A. Hers was 6 inches thick.

Q. So that would be 21?

A. About 21 to the top of the floor ceiling.

Q. Then on top of that there is usually dunnage?

A. Yes.

Q. So the cargo would ordinarily be a couple of feet above the bottom of the sounding well?

A. Yes.

Q. Give us the length, breadth and depth of the vessel, briefly; I would like to have it.

A. Her length was 192.4; breadth 41.4; her depth was, in the lower hold 18.4; between decks she was 7 feet. That was 18 ft. below the main deck and 7 ft. in the poop.

By Mr. Goodrich:

Q. Making a total depth of 25 ft. 4 inches to the main deck?

A. Yes, sir.

Q. Is that an unusually deep vessel?

A. She was an unusually deep vessel.

By Mr. Englar:

Q. There are lots of deeper vessels aren't there, captain?

A. Hardly, of that size.

Q. There are lots of sailing vessels around deeper than that?

A. Well larger vessels.

350 Q. Captain, will you just run over this bill, January, 1908, and tell me if there wasn't a good deal of wood taken out of the vessel at that time, according to that bill.

A. Well, I don't see anything that shows the amount of wood that was taken out.

Q. It shows the wood that was put in; there was a good deal of oak and yellow pine I notice in the bill that apparently went into her?

A. I don't see——

Q. Do you know, captain, whether or not much timber was removed from the vessel at that time?

A. Well, in the carpenter's bill, Mr. Englar, they charge for wood, for instance, yellow pine, that is the props that are used under a vessel, or different things, shoring, staking, all like that are necessarily charged; it doesn't mean it was actually put into the vessel.

Q. Do you know how much timber was taken out and how much put in?

A. I couldn't tell about that, but I think there might have been something in the ordinary wear and tear of the vessel.

Q. Isn't it a usual thing that in a vessel of that age there is usually rotten wood?

A. Yes, there usually is.

Q. You don't pretend when you inspected this vessel, in 1910, that you looked at every butt and seam on the vessel?

A. In a general way, yes, sir; that is, in making an examination of the vessel, as I did in 1910, I go aboard and look at the scarves in the waterways, look at the butts, for instance, when she was on dock; I examine the cement; after the oakum is put in the seams the seams are cemented, and if a vessel is working, or anything is slack about her, she will break that cement and throw it out; all over the vessel there are signs of the vessel working that will show weakness.

Q. But all you can do is look for general signs?

A. General signs of weakness about the vessel.

Q. In the time that you devote to it you can't go over a vessel and look at every butt and seam?

A. Oh, no, but looking over a vessel, going over her and looking, you can see quick enough whether there is any weakness; it will throw the cement out.

Q. You are speaking of the outside?

A. I am speaking of outside, all over, the caulking of the vessel.

Q. In surveying a vessel of this kind, except a periodical survey for class, it is customary to take the information which you obtain from those in charge of the vessel as to the general facts about the equipment of the vessel as to the order that it is in?

A. Hardly.

Q. I understand, for instance, if you see a vessel has a certain equipment of pumps, and you are told that they are in good order, that would ordinarily be enough, unless you are making a special survey; I mean if you are simply making an inspection on dry-dock, she is being repaired, and you send a man over and he sees that she has certain pumps, he would be likely to take the word of the master in charge?

A. I think any surveyor would not take the word of anybody; he relies on his own judgment entirely.

Q. Would you necessarily take the pumps apart to see if they were in good condition?

A. No, you can see if they have been worked; you take a pump and look at it and see if it has been worked anywhere within two or three days; you can see if it has been in condition and worked.

352 Q. But by looking at them from outside, and supplemented by such information as you can get around a vessel, you can make up your mind without doing any pumping?

A. I can make up my mind, yes, sir.

CLEMENT S. DUNNING, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Captain Dunning, how old are you?

A. 65 years old.

Q. Have you followed the sea?

A. Yes, sir.

Q. How long since you left it?

A. About 15 years, 16 years.

Q. After you left the sea did you become an inspector for the Atlantic Mutual Insurance Company?

A. Yes, sir.

Q. And how long were you with the Atlantic?

A. About 13 years.

Q. When did you leave?

A. Two years ago last May.

Q. And you have now retired?

A. Yes, sir.

Q. And you live at Brunswick, Me.?

A. Yes, sir.

Q. Were you an inspector for the Atlantic?

A. Yes, sir.

Q. And in the course of that employment what was it your duty to do?

A. To go over ships at different times, all the vessels, ships and steamers, to see that they were in good condition for all purposes.

Q. Was there—in the latter part of your connection with the Company were you at the head of the Inspection Bureau?

A. Yes, sir.

353 Q. And the other inspectors made reports to you which become a part of the records of the Company; is that true?

A. Yes, sir.

Q. Have you had an experience at sea?

A. Over 30 years.

Q. And you have become thus familiar with vessels, their construction, repair, equipment, &c. Do you remember the schooner Edith Olcott?

A. I do.

Q. Did you inspect her for purposes of insurance from time to time?

A. I only have a recollection of the last time that I saw her; I know I saw her more than once, but I can't give you the dates; I remember the last time that I saw her.

Q. Showing you a slip which you have handed me: Is this slip from the records of the Atlantic?

A. It is.

Q. Is this your report of the 12th of November, 1907?

A. It is.

Q. Did you examine the vessel at that time?

A. I did.

Q. Please tell us what examination you made and what conditions you found?

A. I went over the vessel thoroughly and examined her all over, that is, without boring and cutting into her, examined her for any signs of weakness or anything of the kind, to see what condition she was in.

Q. Did you make a report as a consequence of that?

A. I did.

Q. And as the result of that did the Atlantic give her a certain classification?

A. It did.

Q. You remember that the vessel was built in 1890?

A. Yes, sir.

Q. What was the classification that the Atlantic gave her?

A. They gave her A1 1/2 dots.

354 Q. What does that mean?

A. That is their own private classification for insurance purposes; it doesn't have any connection with the Bureau.

Q. Could she have received in the Atlantic any higher classification than she had at that time for a vessel of her age?

A. No, it was as high as we gave to any of that age.

Q. Now did you have associated with you, under you in the Bureau, Mr. Waters?

A. Yes, sir.

Q. Did he make a report of an examination of the vessel on the 4th of May, 1910?

A. He did.

Q. Is the slip that I show Mr. Waters' report of that inspection?

A. Yes, sir; it is in his handwriting.

Q. And Mr. Waters is now dead?

A. Yes.

Mr. Goodrich: May I read into the record Captain Waters' report at that time, as follows:

"Four masted schooner Edith Oleott, of N. Y., Captain Morris; 1106 tons, built Maine, 1890, reported caulked main deck and searched poop deck 12/0/7, docked, searched bottom and painted, 8/09 deck load and hold partly discharged; from what I could see she appears to be in good condition, 5/4/1910 A1 1/2 dots."

Q. Referring to the last part of the entry, "A1 1/2 dots," what does that mean as to what happened in your office to that vessel at that time?

A. Well it means that she is a vessel in good condition for insurance purposes, and a vessel of that age.

Q. In the same high class that you have already spoken of?

A. The same as she had before.

Q. The Atlantic extended to her the highest class that a vessel of her years could receive, and extended it after examination by Captain Waters?

A. Yes, sir.

355 Mr. Englar: I am not objecting on the ground of immateriality or incompetency of this evidence; I don't want your Honor to understand that I am considering its force or value; I don't want to encumber the record. As to the report of Captain Waters, I don't take any exception as to the report going in on account of his death, but I do object to what part of it is hearsay.

Mr. Goodrich: I don't think there is any probative force in the words "caulked," &c.

Q. You have known the Edith Olcott for some years?

A. Yes, sir.

Q. What have you to say as to her general character for upkeep and seaworthiness, when you have known her?

A. She has always been in first class condition.

Cross-examination by Mr. Englar:

Q. When did you leave the sea?

A. About 1897 I think it was.

Q. You were in sailing ships, weren't you?

A. Yes, sir.

Q. During your career as a sailing master you commanded vessels that were deeper than this Edith Olcott, didn't you?

A. No, I think not.

Q. You commanded some as deep, didn't you?

A. Yes.

Q. She was 18 feet to the main deck, and the poop deck was 4 feet above it?

A. About the same depth, but not any deeper.

Q. Well, in vessels as deep or just about as deep as the Edith Olcott you have sailed without any steam pumps at all, haven't you?

A. Yes; not quite as deep as that; vessels 24 feet deep.

Q. Without any steam pumps at all?

A. Yes, sir.

356 Q. And you have had leaks, haven't you?

A. No.

Q. You have had occasion to use your hand-pumps?

A. When I say no leaks I mean nothing of a serious nature, very slight.

Q. But you have had occasion to keep pumping for some time with the hand-pumps?

A. I have used them occasionally at sea, yes, perhaps tried them every 24 hours.

Q. And you have had occasion to use them when your vessel was making water sometimes?

A. Yes, sir.

Q. Weren't you accustomed to get the water out of her all right with hand-pumps?

A. The little she was leaking.

Q. A hand-pump will work all right in a vessel of that kind?

A. 24 feet, yes.

Q. The only difference is that it works a little harder on a shallower vessel

A. And doesn't throw as much water.

Q. But the difference is a difference of degree, it gets a little harder and a little less as it goes up?

A. Yes.

Q. But the more the water came up the less distance you would have to raise it, wouldn't you?

A. Yes.

Q. So that the more water there was in, the easier she would pump with a hand-pump?

A. Yes.

By Mr. Goodrich:

Q. In the old days when they had hand-pumps the chances of saving a vessel were very slight after she sprang a leak?

A. In a great many, if it hadn't been for steam pumps the men wouldn't have been saved.

357 BENJAMIN F. HOYT, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Hoyt, how old are you?

A. 55 years old next July.

Q. Have you ever followed the sea?

A. 14 years in steam and 9 in sail.

Q. And when did you quit the sea?

A. May, 1896.

Q. Then what did you do?

A. Marine surveyor for the Boston Insurance Company.

Q. Are you that still?

A. I am still.

Q. And you make reports to the Boston, do you, of your inspection of vessels?

A. Yes, sir.

Q. Do you remember having inspected from time to time the schooner Edith Olcott?

A. Yes, sir.

Q. I show you five slips, the earliest of which is dated 6/3/06, and the latest July 13, 1910, and ask you if you inspected the Edith Olcott from time to time?

A. Yes, sir.

Q. Commencing at the earliest date you inspected her in 1906?

A. March, 1906.

Q. And in what condition did you find her, without reading your slip; in what condition did you find her?

A. That I can't tell without reading the slip; I can't carry it in my mind.

Q. I don't want for you not to read the slip, but look at it and refresh your memory from it, and give me the result of that inspection?

A. Well, I make a remark here that the vessel is getting — on her bottom; and opposite, caulking. That is March 6, 1906.

Q. What class did she have in the Boston at that time?

A. 1 1-2, good for three years.

358 Q. Could she for her years have had a higher class; she was built in 1890?

A. Yes, I guess on account of that caulking she could have gone to 1 1-4.

Q. Was the caulking afterwards done, and did she get a better class?

A. It was done in 1907.

Q. And as a result of that what class did she get?

A. 1 1-2 good.

Q. Is there anything better she could have had at that time?

A. That is as good as she could have had.

Q. From that time or what have you to say as to the rating that the Boston gave her, based upon your examinations?

A. Well, I don't quite understand your question.

Q. She received certain rating in the Boston?

A. Yes.

Q. Could she have had any better from 1907 down?

A. She could have had no better.

Q. You saw the vessel from time to time, and it was on your reports that the rating given by the Boston was based?

A. Yes, sir, I rated them myself, I did the rating.

Q. What have you to say as to the vessel, the way she was kept up, and her seaworthiness, particularly in the year 1910 just before she was lost?

A. The vessel looked in very fine condition, but she showed —

Q. No, 1910, just before she was lost?

A. That is what I am talking about; she looked in good condition, outside of ordinary wear and tear, for the class of cargo which she would carry, the class of trade she had been in.

Q. What have you to say as to whether she was a good vessel or not?

A. She was a good vessel.

Q. Had she been kept up?

359 A. She had been kept up as well as any vessel of her age could have been kept up in the trade she was in.

Cross-examined by Mr. Englar:

Q. You simply made a general inspection of the vessel?

A. General inspection, sir.

Q. Captain Hoyt, there has been a good deal said about a circulation pump that this vessel is supposed to have had on; would a vessel of this kind have a circulation pump?

A. She would have a circulating pump to pump the water through her condenser so as to put the water into the boilers, and then use it over again; I don't know whether she had any auxiliary suction to her boiler or not; if she had an auxiliary connection to her suction she would have put it on to the bilges.

Q. Did this vessel have any condenser?

A. I don't know.

Q. She may have used fresh water, mayn't she?

A. No, she would use fresh water any way, but with a condenser she condenses the water and uses it over and over again; that is what the circulating pump is for, to pump the steam back into water and then into steam again.

Q. So they would have to use the pump for that purpose?

A. Certainly.

By Mr. Goodrich:

Q. And in order to cool and condense the steam for use again as fresh water, they could take water out of the inside of the vessel as well as from the outside?

A. It wouldn't be judicious to do so; the water in the inside would be full of sediment, and it would plug the pipes up.

Q. But they could do it if there was a reason, if the vessel was willing they would take that risk, wouldn't they?

A. They might.

360 WILLIAM J. FLETCHER, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Captain Fletcher, how old are you?

A. 66.

Q. And what is your business?

A. Going to sea as captain.

Q. And how long have you been a captain?

A. About 46 years.

Q. When did you get your first command?

A. When I was about 18 or 19.

Q. And have you been sailing as master ever since that time when you have been at sea?

A. I have.

Q. And how long have you been sailing for Mr. Fields S. Pendleton or Mr. Pendleton's family?

A. About 38 years.

Q. How many vessels of his have you been in during that time?

A. Oh, I think about 16 or 17, sir.

Q. During the course of your association with Mr. Pendleton and his family, and more particularly during the time that you have been associated with Mr. Fields S. Pendleton, what have you had to do with the repairing or the building of vessels?

A. I have superintended; all that I have had to do of those repairs I superintended the whole thing.

Q. Being left free by Mr. Pendleton to do what was needed?

A. Yes, sir.

Q. He has placed in your hands, has he not, the entire business of repairing vessels and making them fit for sea?

A. Yes, sir.

Q. Have you ever superintended the construction of vessels?

A. I have.

Q. How many?

A. Four.

361 Q. Have you ever had a disaster at sea?

A. Never, sir.

Q. Have you ever been in any difficulty that has cost the underwriters a dollar?

A. No, sir.

Q. In how many vessels of the Pendletons have you been master, or whose repairs you have overseen, in the last 15 years?

A. I should say 8 or 9, sir.

Q. Were you master of vessels owned by the father and grandfather of Mr. Fields S. Pendleton?

A. I was, yes, sir.

Q. Did you yourself have charge of the repairs of the Harold C. Beecher?

A. I did.

Q. Were those extensive repairs?

A. Yes, sir.

Q. And were you in entire charge of them yourself without any oversight from Mr. Pendleton?

A. Yes, sir.

Q. What about the Jennie Hurlburt?

A. The same.

Q. How many vessels are there whose repairs you have overseen for Mr. Pendleton?

A. Well, I should say 9 or 10 at the least.

Q. And he turns over to you the entire matter of the repairing, and when the repairs are finished you check up the bills and he pays them on your O. K.?

A. Yes, sir.

Q. And you have been doing that for him for some years?

A. Yes, sir.

Q. In the spring of 1910, were you the senior captain in the Pendleton service?

A. I was.

Q. And as such were you entitled to the pick of the vessels of the Pendleton fleet?

A. Yes, sir.

Q. In that spring what vessel were you sailing in before you were in the —?

A. The Edith Olcott.

362 Q. Did you see the Edith Olcott in New York after Mr. Pendleton purchased her?

A. I did, yes, sir.

Q. Did you become the master of her?

A. I did.

Q. At whose request; did you want to go in her yourself, or—

A. Yes, sir.

Q. And you sailed a voyage in her?

A. I did.

Q. Where did you go?

A. From Baltimore to Jacksonville, Fla.

Q. Did you join her at Baltimore?

A. No, sir, here.

Q. And you went from here to Baltimore light?

A. Yes, sir.

Q. And from Baltimore to Jacksonville?

A. Yes, sir.

Q. With cargo?

A. Cargo and railroad iron.

Q. Before you took the vessel, before you went in her as master did you go over her, examine her?

A. I did, yes sir.

Q. In what condition did you find her?

A. I found her in good condition, sir.

Q. Was she out of the water at the time, on the dry dock?

A. No, sir.

Q. Did you make as complete an examination as you could of her considering the fact that she was in the water?

A. Yes, sir, I did.

Q. And what was the result of your examination?

A. Well, I found her in good condition, sir.

Q. What sort of cargo is railroad iron?

A. It is considered the hardest cargo there is, or one of the hardest, that you can put into a vessel.

Q. How did she behave on the trip from Baltimore to Jacksonville?

A. Fine.

Q. Any starting of seams or butts, or any leaking?

A. No, sir.

363 Q. What sort of weather did you have?

A. We had fine weather from Baltimore to Hatteras; then we took a gale of wind from the south, and I see it was going to be a heavy gale of wind, and I thought she would do better at anchor; so I anchored the vessel off Cape Lookout; I saw she would do a good deal better at anchor, so I give her out 125 fathoms of chain, and she lay there 30 hours.

Q. How did she behave?

A. She behaved fine, sir.

Q. Did the ship get any water into her?

A. The water was continually breaking over her, all the time, 30 hours.

Q. What did you do with the pumps?

A. I sounded them I won't say how many times, but I was quite anxious; we tried the pumps every four hours, getting up very little water out of them.

Q. Did the pumps work all right in getting out what water you could find?

A. Yes, sir.

Q. You delivered the cargo safely at Jacksonville?

A. Yes, sir.

Q. Did you have a return cargo?

A. Yes, sir.

Q. What was it?

A. Yellow pine ties.

Q. What was the port of her destination for those?

A. Perth Amboy.

Q. You brought them forward, did you?

A. Yes, sir.

Q. When did you reach New York—or Perth Amboy rather?

A. On the 28th of June, sir.

Q. Where did you deliver your cargo?

A. At the Lehigh Valley Railroad.

Q. What sort of weather did you have on the way up?

A. Very good from Hatteras up here, but rough south of Hatteras.

Q. How did the vessel behave?

A. Fine.

364 Q. Had you any occasion to anchor on that trip?

A. No, sir.

Q. How did the pumps work?

A. Fine.

Q. Any trouble with them whatever?

A. No, sir.

Q. What pumps did you use?

A. We worked the wrecking pump once, the Messenger pump once or twice; we used the circulating pumps and hand-pumps afterwards.

Q. Did you use both hand-pumps?

A. Yes, sir.

Q. How did they work?

A. Fine.

Q. When the vessel arrived at Perth Amboy, or while the vessel was there, did you have a conversation with Mr. Fields S. Pendleton in regard to taking the vessel out and having an examination of her made?

A. After arriving at Amboy and docking the vessel I came up here, and Mr. Pendleton asked me how the vessel was; I said she was in fine condition, and he says I am about to charter her for Porto Rico. Well, I says, what business do you get? I thought I ought to ask, as long as I had been with them so long; and he told me it was very good business. He says, When are you going to get the cargo out, so she can be examined. I said, that is unnecessary, but we will get it out as quick as we can.

Adjourned until Monday, Oct. 13, 1913, at 10.30.

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October 13, 1913—10.30 a. m.

Met pursuant to adjournment. Parties present as before.

Testimony of Captain Fletcher Continued.

By Mr. Goodrich:

Q. On Friday, Captain Fletcher, I asked you in regard to an examination of the vessel when you first went in her; where was the vessel at that time?

A. At Lehigh Valley Dock, sir, Perth Amboy.

Q. And was that before you went in the vessel at all as master?

A. I didn't rightly understand your first question, sir.

Q. (Repeated.) On Friday I asked you in regard to an examination of the vessel when you first went in her; where was the vessel at that time?

A. Sandy Hook Basin.

Q. Where was that?

A. Inside of Sandy Hook.

Q. And did your examination at that time include any examination of the suction of the various pumps?

A. Well, do you mean how I examined her?

Q. Yes, tell the story.

A. Well, it was Saturday when I anchored there, and the wind was ahead; next day I—we done nothing; and Monday morning I went to the engineer and asked him to show me about the engine room, and so he did.

Q. What was the name of the engineer?

A. Mulligan.

Q. Proceed.

A. I told him that I wanted to see everything, as I was a new man aboard, and he showed it to me with pleasure. Then I went out to the mate, Mr. Simmons, and I told him it was my custom when I went aboard of a vessel as master to examine every part of her, and therefore I wanted him to take the hatches off.

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Q. Had she cargo in at that time?

A. No, sir, she was light. So he did. Then I said, now we will go into the hold with two or three men and look at the vessel in general; and we took a lantern with us aft and forward, so that I could see everything. I got into the lower hold and I went down on her first and I examined the pump boxes—

Q. Please explain to the Court what you mean by the boxes.

A. The pumps in each hold is boxed, so that nothing can't touch them; there is uprights, there is perpendicular and crossways; it is boarded up with double boards, thus letting no dust, nor nothing, into them; and I saw that the cargo in discharging had torn some of the boards off at the bottom and also at the top, and also all along up the bulks; so I told the mate, Take your axe and tear off those boards, I want to see the suction of those pipes; he done so. I found that the pipes were in good condition, galvanized pipes.

Q. What pipes did you examine? .

A. Those of the after pumps.

Q. The hand-pumps?

A. Yes, sir.

Q. Did you make an examination of a similar section of the messenger pump?

A. After I had fixed those boxes and examined the suction as near as I could get to the bottom of the suction, and cleaned the dirt out, and everything like that, then I told the mate to box those pumps; I had taken most of the boards off of the boxes in the lower hold, because they were stove, and the like of that; and then I took the mate and two men and I went to the messenger pumps, and I found the boards on them in bad condition; I took them down the same as I did the after pumps. I examined the pipes and found that
367 they were galvanized pipes, they had not been put in very long. I also went then to the wrecking pumps' boxes and found that they were knocked off too, the boards; I took them off, the most of them, and examined that pipe; I found that that was a galvanized pipe; I looked the whole length of them and saw that they were in good condition. After fixing that I went to the circulating pump and found that that was the same, and fixed all those in the lower hold; and then I went in the between decks and some of the boards, most of the boards in the after hold was knocked off of the hand-pumps, and I took the lantern and looked at those pipes, and took my knife and scraped them, and there was nothing to hurt them; and I boxed those up again. And then I went to the poop of her, and of course in the poop the boards was all on; but I took the axe and one man with me and pried those boards off and see the pipes, and they were all right; I examined every part of them except the part that went through the deck; that I couldn't see; but all the rest I examined.

Q. And what do you say in general as to the result of that examination of the pipes, as to their condition?

A. They were in first class condition, sir.

Q. Did you re-box them?

A. I did re-box them, yes, sir.

Q. So that they were protected as the vessel went to Baltimore to take on her cargo?

A. Yes, sir; we were going after a cargo of railroad iron, and I wanted those pumps in first-class condition, I wanted to know it myself, Mr. Goodrich.

Q. What do you say about the circulating pump; could that be used to pump water from the hold of the vessel?

A. It was rigged to pump the vessel out, fill the boiler or wash down decks.

368 Q. When was the vessel lying in Sandy Hook Bay, as you have just described?

A. The 16th day of April, sir.

Q. Nineteen hundred and—?

A. Ten.

Q. When we closed your examination on Friday we were speak-

ing of a conversation with Mr. Pendleton, and certain things that you did in pursuance of that conversation after the vessel had returned to New York Bay and was at Perth Amboy, and there was some discussion between you and Mr. Pendleton as to the charter upon which the vessel was about to enter, namely a charter for Porto Rico; you asked about the business, and you testified that Mr. Pendleton said, When are you going to get the cargo out so she can be examined. Now proceed from that point and tell what examination you had for the Porto Rico cargo at Perth Amboy, and what your report to Mr. Pendleton was.

A. That day I went to Boston, Mr. Goodrich, and I got back again, and after the vessel was discharged;—Mr. Pendleton told me previous to this, the first day I seen him, to take the vessel to Perth Amboy Drydock and put the vessel in first-class condition; I told him that I would; so we took the vessel there, hauled her out, cleaned her bottom, tried her oakum, give her two coats of paint, caulked her poop deck and her bulkhead across and around her hatches, that is down in what we call the well, well deck; and I sheathed her hatches with iron, and put in a full set of standards in the lower hold on the keelson and part in between decks, and give her decks a coat of pine oil, boiled oil.

Q. And what was the result of that examination and overhauling?

A. Well, I called it a first-class examination.

Q. And in what condition was the vessel after that?

369 A. Just as good condition as I could put her in.

Q. Was she in good condition, seaworthy?

A. Yes, sir, first class condition.

Q. On what dock was she at Perth Amboy?

A. Perth Amboy Drydock.

Q. Did you make at that time any examination of the pumps or suction?

A. I can't rightly understand you, Mr. Goodrich.

Q. While the vessel was on drydock at Perth Amboy did you make any examination of her pumps or suction?

A. Yes, sir.

Q. What did you do in regard to that and what did you find?

A. I found that some of the boxes that I had put on, the boards I mean, were knocked off, &c. I then see the foreman, and I went to Mr. Black and asked him to let me have a couple of good men, somebody who knew something about iron, to help me examine those and put back those boards again. I went in the hold and examined the whole of them and fixed them.

Q. And as the result of that work what was the condition of her pumps, her suction, and the pump suction casings?

A. First class.

Q. After that did you have a conversation with Mr. Pendleton in which you reported as to the condition of the vessel?

A. I did.

Q. What did you say to him?

A. I told him the vessel was in pink condition.

Q. You at that time knew the business on which the vessel was to go;—I mean the charter upon which she was to enter, did you; you knew the business upon which the vessel was about to enter, did you not, the Porto Rico charter?

A. I did, yes, sir.

Q. Do you have to make any special preparations for a
370 charter like that, for Southern waters?

A. Yes, sir.

Q. What preparations do you make, and how?

A. We generally put on extra stores, and extra fittings-out for the vessel.

Q. Did you examine the fittings of this vessel and her stores before you left her finally?

A. I did.

Q. What have you to say as to those?

A. Well I ordered enough of everything for a six months' voyage.

Q. Was the stuff delivered while you were there?

A. It was.

Q. Was there any lack of packing or tools or supplies of any sort?

A. No, sir.

Q. Where were the packing and supplies kept?

A. It was kept in a spare room in the cabin

Q. Whose room was that?

A. Well, it was called the second mate's room.

Q. Did she carry a second mate?

A. No, sir, she didn't.

Q. And what was kept in that room?

A. Well, all pipe fixtures, cutting threads, and dies, spare hammers, machine hammers—everything like that; wrenches, and packing, and everything like that.

Q. Of which she had an abundant supply?

A. Yes, sir.

Q. You were on the vessel, were you not, during the time of her loading?

A. Yes, sir.

Q. And until shortly before she sailed?

A. I was there from when she commenced loading all the time until I cast the lines off when she went out of the dock.

Q. Where did she load?

A. Black Tom, and Pier 11, East River.

Q. What cargo did she take in at Black Tom?

A. Two-thirds cement, iron, machinery and boilers.

371 Q. And what was the cargo you-loaded at Pier 11?

A. Well, the general cargo.

Q. You remember the circumstances of her departure from Pier 11?

A. Yes, very well.

Q. Will you kindly describe them?

A. Well, after the vessel was loaded I went to Mr. Benner's office and asked him—I wanted to sign the bills of lading; he said, the bill of lading is not ready, Captain, and I says, Well, when

will they be ready? He said, They won't be ready today. Well, I says, I have to go home, and I would like to sign the bills of lading; he says, I can't get them ready; well, he says, why not leave it with Mr. Pendleton to sign? I said, Will that be all right? He said, certainly; I said, All right, gentlemen; and I went right to Mr. Pendleton's office and told the people in the office—Mr. Pendleton I don't think was there, I don't remember; so then I went down, as I had made arrangements with Mr. Hall, the shipping master, to have that crew come on a tugboat.

Q. Why had you made those arrangements?

A. Well, I will tell you: While they lay there, every man that Mr. Hall would put aboard, the Seamen's Union would manage somehow, in a ridiculous way, to get them out of the vessel; so I took that plan to have that vessel ready. When that tugboat backed in, why to have that crew come out and take the vessel out; and she went out.

Q. Who were the men on the vessel when the tugboat came alongside?

A. The captain, mate, engineer, and one stowaway—and cook.

Q. And you yourself?

A. No, sir, I was on the dock.

Q. Did you help cast off?

A. I cast every one of her lines off, sir.

Q. Did you see any trouble with a crowd of persons on the dock?

A. Yes, sir.

372 -Mr. Englar: Is that material?

The Court: It may be, I will take it.

Q. Describe it.

A. When the tugboat backed in alongside of the vessel the crew jumped on to the topgallant forecastle, and when they got on to the topgallant forecastle the people on shore called out, damning them, and calling them scabs and throwing rocks, stones, brickbats and everything like that; and I felt like going in myself to it, but I held to it; and I said Go ahead, Captain, go ahead, take the vessel out of the dock; I went as fast as the vessel went and cast her stern line off of the vessel as she went out; and I swung my hat to the captain as signal bood-bye, and I turned and went half-way up the dock, and a man came up to me and he said, Weren't you in that vessel? A. I said yes, I have been in her a trip or two; and he said, You God-damned old cuss, I've a good mind to give you one. I said, You had better use better judgment; and he turned and went off, and I got on the steamboat and went to Boston.

Q. Why did you go to Boston, Captain?

A. Why did I?

Q. Yes.

A. I went there to see my wife.

Q. Were you married about that time?

A. I was married when I went to see Mr. Pendleton and got his orders about fixing the vessel—I went to Boston and I got married.

Q. What have you to say as to the stowage of the cargo on the trip from New York toward Porto Rico; was it well stowed, or badly stowed?

A. It was well stowed, sir.

Q. Who was the stevedore?

A. Mr. Dunn.

Q. Who employed him?

A. Mr. Benner.

Q. Did you see it stowed yourself?

A. I did, most of it.

373 Q. Was it stowed satisfactorily to you?

A. Yes, sir.

Q. What papers do you hold as master?

A. I hold a sailing license for vessels over 700 tons; I hold an ocean steamship license for all oceans or any rig.

Q. Now do you remember whether you did any pumping of the vessel from the time she left Perth Amboy drydock until you left her on the afternoon she sailed? If so, tell us what it was and what pumps were used.

A. The day that we left Black Tom; as the vessel was down a little by the head, I told Mr. Bellman, the mate—I says, You had better pump this vessel out forward now, while we are going over, for we shall be so busy when we get over there we may forget it. He went and told the engineer to start the wrecking pump, and he pumped her out, and sucked her dry.

Q. Were the hand-pumps used on that occasion?

A. No, sir, not then.

Q. That was because she was by the head?

A. Yes, sir.

Q. Well do you know whether the hand-pumps was afterwards used when her trim was different?

A. Yes, sir.

Q. Where was she then?

A. She was alongside of Pier 11.

Q. And did you see them used?

A. I did, and helped the mate use them.

Q. Which pump was used, or were both used?

A. As the vessel had a little list to starboard, we used the starboard pump.

Q. Did you use the port pump at all?

A. I don't remember that we did.

Q. How did the starboard pump work?

A. First-rate.

374 Q. After the vessel left the drydock at Perth Amboy what was the condition of the machinery in her engine room?

A. First-class, sir.

Q. Mr. Ward, the first officer of the King Edgar, has testified

in this case that when the starboard hand-pump, suction pipe, was laid on deck it was one mass of corrosion, and there were innumerable holes in the pipe; from what you saw of the pipe in the three or four months before the loss of the vessel was that possible?

A. No, sir, not in my opinion.

Q. Do you remember a man coming on board by the name of Gustav Linder, who was going as engineer?

A. I do, yes sir.

Q. Did you have any talk with him?

A. Well, yes, I think I had a little conversation with him.

Q. What was it, do you remember?

A. Why, I think that Mr. Hall brought the man down, that you speak of, I don't remember his name, I didn't know it at that time; and Mr. Hall says, Here's an engineer, Captain. And this fellow was pretty well set up, and I asked him if he was an engineer, and he said yes; and I said, Well, I want an engineer; well, he says, I am one. Well, I says, all right. And he made some remark about my being damned particular, or something like that; and I said something about there are times when a man should be particular. And so he went. When he started to go he went to the door and looked in, and it appears that he had seen or met the engineer that was there then——

Q. John Green?

A. I think, so, yes, sir.

Q. Yes.

A. And they probably talked there two minutes, and he came out. Hall, I think, kept talking with me about the other part of the crew; and I said, Mr. Hall, that don't look to me like a man who knows his business, and, I said, another thing, he is full
375 of rum, and I have got no business with a man that drinks rum; and I said, I don't want him. So he went ashore, and I have never seen him since to my knowledge.

Q. Do you remember John Green?

A. Yes, sir, the man who was in the engine room?

Q. Yes.

A. Yes, sir.

Q. How long was he on board?

A. Well, I should say two days and a half, or such a matter.

Q. Do you remember any talks with him about supplies for the vessel, packing and so on?

A. No, sir.

Q. Did he ever ask you for anything?

A. I think he asked me for a valve.

Q. Yes; what did you do?

A. I told him to go up to 77 South Street and get everything that he wanted.

Q. What was 77 South Street?

A. That was a ship chandler's store, sir.

Q. And did he go, do you know?

A. I think he did.

Q. Did you ever take him aft and show him the tool room?

A. I did, when he come aboard of the vessel I took him in the engine room and showed him; I said, Chief, this is your department, and I want to show you round a little; he said, All right, Captain; he was sober then; and I showed him different places, and showed him where I kept a supply of everything and I said, "Come aft and I will show you where we keep the balance of the supplies; so I took him aft and down in the cabin and called his attention to the tools which were there and the supplies; and he went back. And in about two days it was, I think, he come to me and says, Captain I
376 am sick. Well, I says, I think you are; I said, what's the matter with you? Well, he says, I feel sick. Well I said, Give me some other points, won't you, where you feel sick, I am somewhat of a physician myself. Well, he said, I don't like to tell you.

Q. Well, did he tell you he had some disease?

A. Yes, sir, he did tell me he had a venereal disease. I said, Didn't you know it when you came here? He said, yes. And I said, Well, get to Hell out of this. And he got out.

Q. Did you know Captain Wallace?

A. I did, yes, sir.

Q. What was his capacity as a seaman?

A. His capacity?

Q. His reputation and capacity?

A. He was a good, first-class captain.

Q. And what do you say as to the crew of this vessel, the number of them?

A. The number, nine—all right, sir.

Q. Full crew?

A. Yes, sir.

Q. Was the vessel trimmed all right when she left this port?

A. Yes, sir, she was all right.

Cross-examination by Mr. Englar:

Q. How was she trimmed; was she a little by the stern?

A. Yes, sir.

Q. Captain, are you an engineer?

A. Am I——

Q. Yes.

A. No, sir.

Q. Your knowledge of an engine room equipment is simply that of a man who has commanded sailing vessels for many years and has had more or less to do with such equipment?

A. Well in part, yes sir.

Q. I mean to say that you never have sailed as an engineer?

A. Well, I mean to say that I have been in the engine
377 room lots and took charge of the engine when they didn't understand it themselves.

Q. When your engineers didn't?

A. Well, sometimes we get stuck you know, our engineers, and we have to know something about it as captains ourselves.

Q. Well, that is just what I am coming to: You know as much about them as a man who commanded sailing vessels would necessarily pick up in years of experience?

A. Well, I think I do.

Q. But it never has been your business to run an engineering equipment?

A. I think I have.

Q. Have you ever been in charge of an engine room as engineer?

A. No, sir.

Q. Have you ever had any experience on shore as a mechanical engineer?

A. No, sir.

Q. You have spoken of packing, Captain; will you tell us what kind of pump the wrecking pump was, what make?

A. Hyde's wrecking pump.

Q. What was the diameter of the suction?

A. Six inches.

Q. What kind of packing does that require?

A. Well, it requires hemp packing.

Q. What does it look like?

A. Or leather, either one.

Q. Well is it packing that is prepared in advance for that pump?

A. Yes, sir.

Q. And what does it look like, if you know?

A. Well, I should say, as I said before, it goes with leather, and hemp flax packing, made for the purpose.

Q. What is the shape of this packing?

A. Well, about, I should say, $\frac{7}{8}$ to $\frac{3}{4}$ of an inch square.

Q. It is a square packing?

A. Yes, sir.

378 Q. Is it waxed, or anything, to keep it in shape?

A. No, it is wove that tight that it stays in shape.

Q. It is a tight-woven square hemp packing?

A. Yes, sir.

Q. Now the messenger pumps, what kind of packing is used for them?

A. Messenger pumps?

Q. Yes.

A. Yes, sir, they are a different kind of pump altogether; those pumps were formerly hand-pumps, but they were turned by a crank like, and small packing; there was a plunger, and a space socket in it; and that takes I should say, a $\frac{5}{8}$ packing.

Q. Of the same character?

A. Of the same kind, yes sir.

Q. Now did this boat have a condenser?

A. Condenser?

Q. Yes?

A. Yes, sir.

Q. And that was what the circulating pump was for?

A. No, it was to pump the vessel out; it was to wash down decks;

it was to fill the boiler, or pump water through the condenser to save fresh water.

Q. The primary purpose of the pump was to use in connection with the condenser, was it not?

A. Eh?

Q. The principal purpose of that pump was for use on the condenser, was it not?

A. Well, we use it when we use low pressure, we pump through the condenser.

Q. That is what that pump was put in there for?

A. It was put in as I said, for three or four uses.

Q. How big a pump was it?

A. Three inch suction.

Q. When you were in dock at Perth Amboy did you take off all of the boxing again?

A. No, sir.

379 Q. You simply replaced what had been taken off?

A. No, I took off a few, those that were started; I didn't think it necessary, for a month before I examined all of those.

Q. But you thought it was a good plan, in spite of that fact, to look at the suctions wherever you had an opportunity, didn't you?

A. Well, I thought like this—a month ago I went through them and found them all in good shape; but where the boards were off, or where there was a chance for a piece of tie or railroad iron to strike those pipes, I looked at them and examined them, but didn't find any scars on the pipe.

Q. You can't say exactly how much of the boxing was off, I suppose?

A. No, I couldn't tell exactly; wherever a board had been knocked off I looked at the pipe, and some I pried off, where I see that the railroad iron had struck the box, or dented it, I pried the box off and looked at the pipe.

Q. Captain, there is testimony in the case already that when the starboard hand-pump was used in port here, the pumping was done by the mate and the cook; do you say now that you actually did some of it?

A. Well, that is a question I didn't get hold of; come up and speak louder, please.

Q. I say there is testimony in the case that the pumping with the hand-pump which was done in port here was done by the mate and the cook?

A. And myself.

Q. You also did it?

A. Yes, sir.

Q. Were there three of you working at the pump?

A. Yes, sir.

Q. Was there much pumping to do?

A. No. There was three. I knew the pump went hard, because they had to lift the water some 25 feet, and I see, and I went
380 and helped them when I was there.

Q. Do you own anything in this vessel; are you a part owner of the vessel Edith Olcott?

A. No, sir.

Q. Did you personally go over the packing which you say you had and see that there was packing for each pump, or did you leave that to the engineer?

A. No, I left it to no one; I see that there was enough packing to use for two years, aboard of that vessel.

Q. And you say that there was packing there for each pump, that was true of each pump?

A. That was true of each pump she had aboard of her. Because you know we can't get that at sea.

Q. It is unsatisfactory to try to pack pumps unless you have the proper packing?

A. Well no, I don't think it will work.

Q. It won't work?

A. It wouldn't work if it won't pack.

Q. If you have to use something else, other than the proper packing, the pump won't work well, will it?

A. Well it might work for a short time.

Q. How many pump wells were there that went down to the lower hold?

A. How many pump wells?

Q. Yes.

A. Well, there was two aft, that is the hand-pumps; there was two at the messenger pumps; there was one at the wrecking pump, and there was one at the suction pump, the circulating pump.

Q. There was a separate well for the circulating pump?

A. There was, yes sir.

Q. It is the fact, isn't it Captain, that no member of the crew that was on the vessel while you were in her actually sailed on her?

A. Do you mean that no man on the vessel that was there when was Captain of her sailed on her?

Q. Yes.

A. No, sir.

Q. Which men sailed on her that were in the vessel when you were in her?

A. Well, that I don't ketch again.

Q. No one who was on the vessel when you were in her actually sailed on her?

A. It was only a few days the steward was there; he went in the vessel.

Q. The steward that you had did go in the vessel?

A. Yes.

Q. But no one else?

A. Well, the engineer, Wright, he shipped in the morning, or about noon time, and he went in the vessel; that is all.

Q. That is all?

A. Yes, sir.

Redirect examination by Mr. Goodrich:

Q. When you took command of the vessel in April did you intend to continue as master of her?

A. Yes, sir.

Q. Did you intend to go on the trip on which she was lost?

A. Yes, sir.

Q. And why did you not go?

A. Well I, like many others, got married, and my wife didn't want me to go.

Q. Did you have a talk with Mr. Pendleton about getting someone in your place?

A. I did.

Q. What did he say to you?

A. He wouldn't let me off only under these conditions. I said, Get a man to go; he says, No, you get a man, I don't want nothing to do with it, I want you to go; I says, I can't go. I wanted of course to please my wife, I didn't want her against me. And he
382 says, You get a good, first-class man, that you know is a first-class man, and under those conditions I will let you off. So I put my old brains together, and I thought of Captain Wallace, and he went.

Q. What was the date of your marriage?

A. The 29th of June, sir.

JOHN H. MULLIGAN, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Mulligan, how old are you?

A. 47.

Q. What is your business?

A. Engineer of sailing vessels.

Q. How long have you been an engineer on sailing vessels?

A. 20 years.

Q. Were you at any time the engineer on the Edith Olcott?

A. Yes, sir, I was.

Q. From what date to what date?

A. About the 28th of October, 1902, to 28th of May, 1910.

Q. Where did you leave her?

A. Sparrow's Point, Md.

Q. Why did you leave her?

A. Well, I got tired of going to sea, I was going to stay ashore for a while.

Q. Did you carry out that plan?

A. Yes, sir, for about eleven months.

Q. And then you returned—

A. To the sea again, and am still following it.

Q. Do you remember the vessel getting her reclassification in 1905?

A. Yes, sir.

Q. At that time what, if anything, was done to the pumps, pipes, connections, engines, boilers, and so on?

383 A. Well, the wrecking pipe and the messenger pump pipes was new; they had to tear them out to put in an assistant keelson, and they renewed them with galvanized iron pipe.

Q. What thickness?

A. Standard thickness, probably 5/16.

Q. What was the diameter of the various pipes?

A. Six inches.

Q. Six inches for which?

A. For the wrecking pump.

Q. And the messengers?

A. The messengers was an inch smaller.

Q. Was anything done to the circulating pump?

A. No sir, the circulating pump was all right.

Q. To what uses could the circulating pump be put?

A. It could be put to pumping out the vessel, condensing steam into water, and for washing down decks, and for filling the boiler and pumping from one tank to another.

Q. And while you were in the vessel was the circulating pump from time to time put to all of those uses?

A. Yes, sir.

Q. What was the size of the suction of the circulating pump?

A. To the bilge?

Q. Yes, to the bilge?

A. Two inches and a half.

Q. Now you have described what was done with the suctions at the time of the Olcott's reclassification in 1905?

A. Yes, sir.

Q. Was anything subsequently done to the hand-pumps?

A. Two years later there was new pipes put in.

Q. Suctions?

A. Yes, sir.

Q. What were they?

A. They were galvanized iron—three inch galvanized iron.

Q. Three inches in diameter?

A. Yes, sir.

Q. That is inside diameter I suppose?

A. Yes, sir.

Q. What thickness?

384 A. Well, standard thickness; all pipe you know is a standard thickness according to the size.

Q. That was in 1907. Do you remember in what month?

A. I think it was in May, we was going out for a cargo of ice, and we looked at the pumps to see that they were all right so we could pump them by hand in case anything happened, and they were put in new.

Q. Were the hand-pumps in the Olcott used from time to time during the period that you were in her?

A. Yes, sir.

Q. And after the new suctions were put in in 1907 did you see them used?

A. Yes, sir.

Q. How did they work?

A. Worked first rate.

Q. When you left the vessel in May, 1910, what was the condition of her pumps and suction, her engines, boiler and machinery throughout?

A. Everything was in first class order.

Q. How had the vessel been maintained while you were in her?

A. Maintained as good as any vessel could be.

Q. What have you to say as to the supply of tools, packing, &c.?

A. She had everything in the line of tools that a vessel could have had—dies, cold chisel, everything that was needed, and a good set of carpenter's tools; there was packing enough aboard of her to last two years.

Q. That is when you left her?

A. Yes, sir.

Q. Where were the tools kept?

A. They were kept in the after cabin tool room—called the tool room, formerly the second mate's room; they didn't carry no second mate and they turned it into a tool room.

Q. Were there also tools in the engine house?

A. Yes, sir, tools we used every day, such as monkey wrenches and hammers.

385 Q. Where was your room?

A. In the engine house, on the after starboard part of the house.

Q. How big is the engine room?

A. Oh it was 30 feet by—

Q. That is 30 feet athwartships?

A. Fore and aft.

Q. Oh, fore and aft.

A. By 28 amidships.

Q. And the engine and the wrecking pump were in that room and the messenger pumps outside?

A. Yes.

Q. And the chains of the messenger pumps went out the after end of the engine house?

A. Yes, sir.

Q. And your room was on the starboard side aft of the engine room?

A. Yes, right next to the messenger chain.

Q. What in your experience should be the life of the hand-pump suction pipes?

A. Well the black iron pipe wouldn't last over six years; the galvanized pipe would last anywhere from eight to twelve years.

Q. One of the witnesses for the libellant in this case testifies that he saw at sea the starboard pump suction pipe on deck, and that it was a mass of corrosion; from what you saw of the pipe when you left the vessel was that possible?

A. No, sir, it don't seem so.

Q. While you were in the vessel in what condition had you maintained her?

A. First-class.

Q. Now Mr. Mulligan, have you had any experience ashore in a machine shop?

A. Yes, sir.

Q. What has been your experience?

A. I worked eleven years for the Knox & Lincoln Railroad.

Q. Where?

A. In Bath.

Q. What does that concern do?

A. Well, it is a railroad repair shop. Then I worked two years in the Hyde Windlass Company.

386 Q. What does that concern do?

A. Builds engines, boilers and pumps for vessels.

Q. Were you familiar with the types of engine and pump that were on the Edith Oicott?

A. Yes, sir.

Q. Do you remember making the examination of the vessel in Sandy Hook Bay of which the captain has testified, Captain Fletcher?

A. Yes, sir.

Q. Were you with him on that occasion?

A. Yes, sir.

Q. And was the examination made?

A. Yes, sir, it was.

Q. And you were present?

A. Yes, sir.

Q. What have you to say as to the condition of the cogs on the two cogwheels of the wrecking pump and the engine when you left her?

A. They was in good condition, wasn't wore much.

Q. From time to time what pumps did you use to free the vessel from the water that every vessel ordinarily ships?

A. I used all of them, sir, to keep them in working order, first one and then the other.

Q. What was the condition of the chains and the sprocket wheels of the messenger pumps?

A. First-class, they wasn't wore any.

Q. Now what is the effective lift of a hand-pump; beyond what length will it not lift water?

A. No pump will lift it over 26 feet.

Q. And how deep were the hand-pumps of this vessel?

A. About 24 I should judge.

Q. So that it was difficult to use hand-pumps on a vessel of her depth, she pumps hard?

A. She pumps hard.

Q. Yes. But it is possible to use them, and you did use them?

A. Yes, they can use them 25 feet.

Q. What pumps did you use if you had no steam?

A. The hand-pumps aft.

387 Q. Where was the house in which the seamen, sailors on this vessel slept?

A. It is aft by the mizzen mast, what they call the amidship house.

Q. And how far aft of the engine room?

A. 80 feet.

Q. 80 feet?

A. Yes, sir.

Q. During all the time that you were in the Edith Olcott did she carry any cargoes which would produce acid in bilge water, to rust the pipes or eat them?

A. No, sir.

Q. What cargoes did she carry?

A. Coal, railroad ties and ice.

Q. Did she carry any railroad iron?

A. No railroad iron.

Q. When you were in her?

A. No, sir.

By Mr. Englar:

Q. You say you left the vessel on May 28, 1910?

A. Yes, sir.

Q. At what place?

A. Sparrow's Point, Maryland.

Q. Who was master of her at that time?

A. Captain Fletcher.

Q. You didn't go with him down to Jacksonville?

A. No, sir; I left her when she was half loaded.

388 FIELDS S. PENDLETON, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Pendleton, you are one of the respondents in this case, a member of the firm of Pendleton Bros.?

A. Yes, sir.

Q. Who is your partner?

A. Edwin S. Pendleton.

Q. Your brother?

A. Yes, sir.

Q. Was he a part owner in the Edith Olcott at any time?

A. No, sir.

Q. Had he any interest in her whatever?

A. No, sir.

Q. When you signed the charter party as agents had he any interest in the vessel at all?

A. No, sir.

Q. And what was the interest of the firm as a firm in the vessel?

A. None whatever.

Q. You yourself were owner, were you not, of 9/16 of her?

A. Yes, sir.

Q. And the balance of the ownership was scattered?

A. The firm never owned any property at all, never in any vessel.

Q. But the balance of the ownership of the Edith Olcott was scattered?

A. Oh yes, distributed.

Q. Distributed?

A. Yes, sir.

Q. You bought the vessel in the spring of 1910, did you not?

A. Yes, sir.

Q. Where was she when you bought her?

A. She was at sea.

Q. Before the vessel sailed on the trip on which she was lost, the Porto Rico trip, will you kindly tell what you did in order to
389 assure yourself of the vessel being in a seaworthy condition; what did you do?

A. I didn't quite catch the question.

Q. (Repeated.) Before the vessel sailed on the trip on which she was lost, the Porto Rico trip, will you kindly tell what you did in order to assure yourself of the vessel being in a seaworthy condition; what did you do?

A. I had Captain Fletcher in the vessel, and I told him to take her to the Perth Amboy dock, haul her out in the dock and fit her to go in the Gulf of Mexico to stay for eight or ten months; the freight rates were the highest they had been in ten or fifteen years, and I wanted to take advantage of those rates.

Q. To the West Indies in general, or tropical waters?

A. Largely in the lumber trade, from the Gulf to Porto Rico.

Q. How long had you known Captain Fletcher?

A. Well, so long as I can remember he has been sailing for our concern; for more than 40 years he has sailed for our concern as master.

Q. What has been your practice since you have been a vessel owner in turning over to Captain Fletcher the building or repairing of any vessels which you owned; what has been your practice?

A. I have turned it over to him because I considered him—there never was any man in this country more competent; I don't know of anyone who has been in this country that has had the success and the accomplishments that he has had, combined with his experience.

Q. Have you had any bad results from thus turning over to Captain Fletcher the repair or building of a vessel?

A. No, sir.

Q. What have been your results?

A. He is the only master that never cost us a dollar; he is the only man I know of that has had that success.

390 Q. What was your method of paying the bills after the work had been done, after any work, either in building or repairs had been done by Captain Fletcher?

A. Well, he sent the bill in, and if he O. K.'d it, I paid it.

Q. Paid it without any question?

A. Yes, sir, he has been doing that for me ever since I came to New York, 22 or 23 years, and he was doing it for my father before

that, and my grandfather before that; he sailed for him in his younger days.

Q. Do you remember that the vessel was repaired, or looked after, examined and minor repairs made upon her at Perth Amboy during July, 1910?

A. Yes, sir; Captain Fletcher took her there at that time.

Q. That was in response to the direction given to him as to which you have just testified?

A. Yes, sir.

Q. Did you have a conversation with Captain Fletcher after the work at Perth Amboy was finished?

A. Yes, sir; I was looking over the bills with him to show what he had done, to get an idea what he had accomplished for the amount of the bill.

Q. What did he report to you as to the condition of the Edith Olcott in respect of seaworthiness at that time?

A. He told me she was in the pink of condition; those were the words that he used—the pink of condition.

Q. Mr. Pendleton, do you know Mr. Ward, the first officer of the King Edgar?

A. Yes, sir.

Q. Did you meet him in Norfolk about a year after the loss of the Olcott?

A. Yes sir, nearly, not quite a year.

Q. How did you come to meet him?

A. Well, I saw the steamer reported there and I went down to see him.

391 Q. Had there been any threat of a lawsuit against you for the so-called salvage services of the King Edgar?

A. Yes, sir.

Q. Who were the proctors for the King Edgar?

A. Mr. Englar—Harrington—

Q. Proctors for the King Edgar?

A. Convers & Kirlin.

Q. And had you some correspondence or conference with them in regard to the assertion of the claim?

A. Yes, sir.

Q. Who was with you at Norfolk when you went to see Mr. Ward?

A. Captain Fletcher.

Q. You went to Norfolk, seeing the vessel was reported, and with you was Captain Fletcher?

A. Yes, sir.

Q. Did you have a talk with Mr. Ward?

A. I did, yes, sir.

Q. Will you kindly tell what that conversation was?

A. Well, I went up to the coal office and found the master, he was there signing his papers, and I had a conversation with him, and he said he didn't know much about it, but he said come on down; the steamer was taking in bunker coal at the coal dock, and

was bound across for Europe. I saw Mr. Ward; it was the first time that I had ever met him, and he said—I told him that I had come down to see him about the statement that had been made about a threatened suit.

Q. Of what suit were you speaking at that time?

A. The cargo people at that time, because I had been advised by the underwriters, the Providence-Washington Insurance Company, that they were going to bring a suit for the cargo.

Q. The cargo that was carried on the Edith Olcott?

A. Yes, sir.

392 Q. All right; proceed.

A. And I had had some previous talk with Mr. Englar about it; and I asked Mr. Ward, I told him I wanted to get a statement from him because I wanted the facts in the case. Well, he said that he couldn't draw up a statement at that time because they were just about ready to leave the dock, the papers had all been signed and they were going to leave within an hour; but he said he would do it on the way over to Europe for me; and I asked him about it, and asked him how the pumps worked, and he said the messenger pump worked well, and he said the last thing we did before we left the vessel was to shut those pumps off.

Q. Did he say anything to you about the starboard hand-pump being corroded?

A. No, sir.

Q. Anything about the butts or seams on deck opening?

A. No, sir, he did not.

Q. Did he say anything to you about the statement that he would make?

A. He said, all you need is my statement to clear you; and he further told me that the Norfolk lawyers had been down there the trip before, when he was in Norfolk, and wanted him to come down there in the middle of the night, with a stenographer and a type-writing machine, and wanted him to make out a statement against it, and he said he wouldn't do any such a thing, and he didn't do it.

Q. Has Mr. Ward since that time demanded money of you for making a statement?

A. Yes, sir.

Q. Did you on or about the day that paper bears date, December 22, 1911, receive that cable from Mr. Ward?

A. I did, yes sir.

Mr. Englar: I would like to see the cable.

It is shown to counsel.

393 Mr. Goodrich: I will connect it by a subsequent letter from Mr. Ward, if you have any doubt of its being a cable from him.

Q. The cable reads as follows: "Glasgow, 18 Filleybros, N. Y. (the cable address of Pendleton Bros. New York) Sailed 30th,

five months' voyage; cable residence by return substantial remuneration will resign berth important." Did you receive this letter which I show you signed "Richard Ward"?

A. Yes, sir.

The cablegram referred to is offered in evidence and marked Respondents' Exhibit A of this date.

Mr. Goodrich: I call the attention of the Court, on the record, to the deposition of Richard Ward taken at Liverpool, England, September 4, 1912, and particularly call the attention of the Court to the signature of the witness at the foot of the deposition.

I offer in evidence letter from Richard Ward to Fields S. Pendleton, dated Liverpool, January 1, 1912.

Received and marked Respondents' Exhibit B of this date. It is read to the Court.

I offer in evidence letter from Mr. Ward to F. S. Pendleton, dated Liverpool, 21st May, 1912.

Marked Respondents' Exhibit C of this date.

Q. Mr. Pendleton, do you recollect two sailors who were on the Edith Olcott named Reichert, or Richards, and Democh, coming into your office?

A. Yes, sir.

Q. What was the conversation with them or either of them?

A. Well they came up to my office and they said that
394 they had been offered \$50 by the Insurance Company to make an affidavit about the condition of this vessel; and they said if you will give us \$50 we will make an affidavit for you. I talked with them and told them that I wasn't paying anything, and they went out. And a day or two later they came back, and I left word in the office that if those men came back they were to be taken to Mr. Goodrich's office.

Q. Who was with them when they came in when you saw them?

A. I don't recollect, I think they came themselves; I didn't know that anybody came with them; they came in my back office.

Cross-examined by Mr. Englar:

Q. Mr. Pendleton, when you had this conversation with Ward did you suggest having him come to the United States to testify?

A. You mean at Norfolk?

Q. Yes.

A. Why at that time he was—he had been trading back and forth, and I thought that would be the best way to get his testimony; there had been no suit, you understand, at that time, there had been no suit at that time brought; it wasn't brought for some, oh, six or eight months after I saw him; of course I didn't know that any suit was actually going to be brought at that time, but I anticipated it, I expected it.

Q. Did you have any discussion with him about compensating him or testifying?

A. Ward?

Q. Yes.

A. No, sir.

Q. Did he ask for anything?

A. Well, he said that you would send a man down there; and the remark he made, he said, You know, we work for a living.

Q. That is all he said about compensation?

A. That is what he said about compensation.

395 Q. Then later, when the vessel didn't come back to the United States you got in touch with him by cable?

A. Well, he wrote me when he got over there, and said—my recollection is that he said he would prepare a statement going over, and—

Q. He told you that at Norfolk, didn't he?

A. I think he did, yes sir, I think he told me they would prepare a statement; he said they were just going out of the dock that day, they had all their bunker coal, all on board, and they were in very much of a hurry; and he said he would prepare a statement for me.

Q. You signed the charter party on behalf of Pendleton Bros., didn't you, of this Edith Olcott?

A. Pardon me?

Q. The signature of Pendleton Bros. on this charter party is yours, is it not?

Mr. Goodrich: We haven't the original charter party here.

A. I think I signed the charter party; my recollection is I made the contract and the terms and everything with Mr. Callahan, and I think, I am quite positive, I signed it.

Q. Do you own in any other vessels besides the Edith Olcott?

A. Yes, sir.

Q. About how many?

A. Oh, I guess 60 or 75.

Q. Do you own the control in all of them?

A. No, sir.

Redirect examination by Mr. Goodrich:

Q. You remember Captain Fletcher not being able to sign bills of lading?

A. Yes, sir.

396 Q. Will you kindly tell the Court what was done in respect of the bills of lading for all of the cargo of the vessel; in the first place how many sets were made out?

A. Well, my recollection is there was three sets and the captain's copy.

Q. Making four in all?

A. Making four in all; and the captain went home; I was away that day—

Q. Wait half a minute.

Mr. Goodrich: I ask Mr. Englar if he has produced among his bills of lading any bill of lading that has come from a shipper?

Mr. Englar: All that I produced came from shippers.

Mr. Goodrich: The shippers' copies?

Mr. Englar: I don't know whether they were shippers' copies, the shippers had them.

Mr. Goodrich: Are they not from the Benner Line?

Mr. Englar: They came into my possession from shippers.

Mr. Goodrich: Have you a full set?

Mr. Englar: Yes, covering the merchandise in suit here; not covering the whole cargo.

Q. Proceed with the story.

A. I expected that Captain Fletcher would return.

Q. The vessel sailed on Sunday afternoon?

A. Yes, and on Tuesday he called up and I advised him Captain Fletcher would be here tomorrow; and on Wednesday I got advices from Fletcher that he wouldn't be here; and they kept calling me up, and said the vessel would be in Porto Rico before they got the bills of lading there; they wanted them to go on a vessel sailing the 6th.

397 Q. There was a vessel sailing on the 6th?

A. Yes, sir. So I signed them very late Thursday night, or Friday forenoon.

Q. Where did you go to sign them?

A. Mr. Benner's office.

Q. Who was with you?

A. Mr. Moran, one of my clerks, was with me.

Q. Did you sign all of the bills of lading, as you remember?

A. Yes, sir.

Q. Showing you Exhibits C to E of October 10, 1913, being the bills of lading that were put into evidence last Friday; look at these and see if all those bills of lading were signed by you personally?

A. Yes, sir.

Q. They are all signed by you?

A. Yes, sir.

Q. So far as you know did the Benner line ever sign any bills of lading on this vessel?

A. No, sir.

Q. Mr. Pendleton, this was the method of doing business, was it not, in regard to goods shipped on board the Edith Olcott; that the shipper would receive from the mate or master of the vessel a receipt for the goods when delivered to the ship?

A. Yes, sir.

Q. That thereafter, upon the surrender of that receipt, a bill of lading, or sets of bills of lading, would be given up on surrender of the receipts?

A. Yes, sir.

Q. Have you those receipts in your possession?

A. No, no, they were——

Q. Have you asked for them?

A. Yes.

Q. Where are they so far as you know?

A. They are in Benner's office.

Mr. Englar: Here they are, Mr. Benner sent them over.

398 Mr. Goodrich: The important thing is that they are in your possession and not in mine.

Q. Mr. Pendleton, going further with the correspondence with Mr. Ward, is the letter dated Port of Lisbon, 5th June, 1911, the first letter that you received from Mr. Ward? Just look through that file, please?

A. Yes, sir, that is the first letter.

Q. That is the first letter?

A. Yes, sir.

The letter referred to is offered in evidence and marked Respondents' Exhibit D of this date.

Q. In this letter, Exhibit D, the first communication in writing that passed between you and Ward?

A. Yes, sir.

It is read to the Court.

Mr. Goodrich: I also offer in evidence the letter of December 30, 1911, from Mr. Pendleton to Mr. Ward——

Q. That is signed, by you, is it not?

A. Yes, sir.

The letter referred to is marked Respondents' Exhibit E of this date.

It is read to the Court.

Reecross-examination by Mr. Englar:

Q. You were the managing owner of the Edith Olcott, were you not?

A. Yes, sir.

Q. Now when she got back, or rather when her crew got back, a protest was drawn up, was it not?

A. Yes, sir.

Q. And signed by a number of the crew?

A. I wasn't there, I don't know about that.

399 Q. It was done in your office, was it?

A. Yes, sir.

Q. And who was the Notary, do you know?

A. Mr. Moran.

Q. He is an employee of yours?

A. A clerk, yes, sir.

Q. In your office?

A. Yes, sir.

Q. Do you know what day it was drawn with reference to the day that these men got back from sea?

A. I don't know, I can't tell you that.

Q. Mr. Moran would know that, I suppose?

A. Yes, sir.

Q. He is here in Court?

A. Yes, sir.

Q. Now was this the first time you had seen Democh and Reichert when you say they came in your office and told you about some offer made by an Insurance Company?

A. Yes, sir.

Q. Never saw them before?

A. No, sir.

Q. Do you know whether they had been there before?

A. I did not.

Q. Do you know whether they were there when the protest was drawn up?

A. I do not.

Q. Who had charge of getting up that protest and having the men sign it?

A. Well, I can't tell you that—Mr. Moran, I guess.

Q. Who is the man who would naturally attend to that in your office?

A. Well, Mr. Moran, and I think Mr. Casey did something on it; my recollection is that Mr. Moran took the oath, he was the only Notary that we had in the office.

Q. You don't know who drew the protest?

A. Well, Mr. Moran drew it up.

Q. He drew it up?

A. Yes, sir.

Q. Do you know whether the whole crew was brought to your office?

A. I do not, only from hearsay; I wasn't there, I was down in Maine at the time on my vacation.

400 Q. Mr. Moran would know that I suppose?

A. Yes, sir; I think Mr. Casey and Mr. Moran attended to the protest; Mr. Moran was the Notary.

Redirect examination by Mr. Goodrich:

Q. Did you subsequently, indirectly or through another, make an offer to Harrington, Bigham & Englar to pay half the expense to have Mr. Ward come to this country and give testimony in open Court or by deposition?

A. Yes, sir.

Q. Was that before his deposition was taken?

A. Yes, sir.

Q. To whom did you make that offer?

A. To Harrington, Bigham & Englar.

Mr. Goodrich: I made it to you, Mr. Englar, in a letter.

HENRY W. GOODRICH, being duly sworn and examined as a witness for the respondents, testifies:

In the latter part of October, 1910, Mr. Edwin S. Pendleton, of the firm of Pendleton Bros., came to my office with two men, who said that they were sailors on the Edith Olcott, and I asked them for their addresses and their names, which they gave me as, one of them,

Reichert, or Richards, and the other Democh; they said they had gone to Mr. Pendleton's office with Mr. Hall, a delegate of the Union; they said the Insurance Company was willing to give them \$50 for making an affidavit in the case, and wanted to discuss with me my paying them. I ordered them out of my office.

By Mr. Englar:

Q. You say that these two men said certain things; do you recall which man it was?

A. No, I do not.

401 Mr. Englar offers in evidence the protest.
Received and marked Libellant's Exhibit 3.

Recess until two o'clock.

2 P. M., After Recess.

Examination of Mr. Pendleton continued.

By Mr. Goodrich:

Q. Did you ever personally inspect the Edith Olcott after you purchased her?

A. No, sir.

Q. I think you said she was at sea when you did purchase her?

A. Yes, sir.

Q. And you handed over to Captain Fletcher the making of repairs and putting her in a seaworthy condition, did you?

A. Yes, sir. Captain Morris went in her first.

Q. I mean after she came back here and before she entered on the Porto Rican trip?

A. Yes, sir.

Q. Were you ever on board of her?

A. I was once; there was a little dispute came up, Captain Fletcher came to the office and said that the stevedore was putting in some—

The Court: Never mind about that.

Q. Did you go on board of her?

A. I just went about amidships of the vessel's deck; I had to stay in the office—

Q. What was the cost to you of the 9/16 you bought?

A. \$9,000.

Q. And how much did you pay in repairs for the vessel aside from chandlery or outfitting, after the purchase and before she sailed on the Porto Rican trip?

A. It was something less than \$2,000; about \$1,500 I guess.

402 Q. Were you ever insured on the hull of the vessel?

A. Yes, sir.

Q. When did you effect that insurance?

A. About the time I purchased her; within ten days or such a matter.

Q. Did you ever increase that hull insurance afterwards?

A. No, sir.

Q. Made no special insurance for this trip?

A. No, sir.

Q. And she cost you as you say \$10,500?

A. I was offered \$12,000 for her by James H. Cox & Company before she left New York—for my interest in her.

Q. How much did you collect on her hull?

A. \$1720.

Q. And that is all the insurance you ever had?

A. Yes, sir.

Q. Mr. Callahan testified as to certain Companies that had insurance on the vessel or her cargo; will you kindly name all of the Insurance Companies so far as you know them that were interested in the Edith Olcott on this trip?

A. Well, the Manheim Insurance Company, the Union Marine, the Boston Insurance Company, the Atlantic Mutual Insurance Company and Chubb & Sons, Providence-Washington, Firemen's Fund, North American—

Q. And the St. Paul?

A. And the St. Paul, yes.

Q. Now who are the agents for those various Companies, without dividing them up; name all the agents of those, without dividing them up.

A. F. Herman & Company; Jeremiah; Boston Insurance for their own office, and the Atlantic for their office; Chubb & Sons are their own agents—

403 Q. As well as agents for others?

A. Yes, sir. And McGee is agent for the Firemen's Fund, the St. Paul and the Providence-Washington.

Q. Now who are the inspectors for those various agents or Insurance Companies?

A. Why Captain Weldon, Captain Brewster, Captain Bagger, Captain Evald, Captain Salter.

Q. Dunning for the Atlantic?

A. Captain Dunning; Captain Hoyt of the Boston, and Captain Proctor, who represents the other Companies that don't have any insurance.

Q. Captain Proctor, in addition to that, is of the American Bureau of Shipping?

A. Yes, sir; such people as Despard, and other insurance brokers he represents.

Mr. Englar: I offer in evidence letter to Mr. Richard Ward from Fields S. Pendleton.

Received and marked Libellant's Exhibit 4.

By Mr. Englar:

Q. Who pays for having the vessel classed with the American Bureau of Shipping?

A. The vessel pays it.

Q. The vessel owners?

A. Yes, sir.

Mr. Goodrich offers in evidence the protest.

Mr. Englar withdraws his offer of the protest.

404 JOHN F. CASEY, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Casey, are you in the employ of Pendleton Bros.?

A. Yes, sir.

Q. How long have you been there?

A. Ten years; a little over ten years.

Q. And are you familiar with the drawing of protests?

A. Yes, sir.

Q. And did you make—not as Notary—did you make the original note of protest, or was that Mr. Moran?

A. I made it.

Q. And that is the note of protest shown in the book which I now show you?

A. Yes, sir.

It is marked Respondents' Exhibit F for identification.

Q. You remember the sailors and the captain, or any of them, of the Edith Olcott, coming into your office?

A. I do.

Q. It seems that the note of protest is dated the 9th of August, 1909; I ask you if that is the date on which the persons from the Olcott came into the office?

A. Isn't it 1910, Mr. Goodrich?

Q. 1910, yes.

A. That is the date.

Q. 1910?

A. Yes, sir.

Q. Had those men just come in from sea on the King Edgar?

A. Yes, sir.

Q. Who came into the office?

A. The captain, Captain Wallace, the mate, the cook and five sailors.

Q. Was the engineer there the first day?

A. The engineer came the first day, but I think a little later; I don't know as he came in with them.

405 Q. Now did you compose the typewritten part of the extended protest?

A. I took it down at the Captain's dictation; I took it on loose sheets just as he recited it.

Q. And then what did you do with it?

A. Passed it to Mr. Moran, who transcribed them on the typewriter in this form.

Q. In other words, the composition of this is yours from the dictation of the captain?

A. From the dictation of the captain.

Q. And the writing of it out is Mr. Moran's?

A. Yes.

Q. He is the Notary?

A. Yes.

Q. He is in Court, is he?

A. Yes, sir.

Q. Now from whom besides the captain, if anybody, did you get this story?

A. Only from the captain.

Q. Were you alone with him when you were talking about it?

A. Alone.

Q. And you wrote it down just as he gave it to you?

A. As he told it.

Q. Did you ask him any questions or did he tell the story?

A. Yes.

Q. Did you see the logbook of the Edith Olcott?

A. No, sir.

Q. Do you know what became of it?

A. I understood it was lost at sea with the vessel.

Q. Did the persons who signed it, come in next day to sign it; I notice that the extended protest is dated the 10th; the first notation being on the 9th?

A. Yes.

Q. That indicates to you that they came in the following day?

A. Yes; the crew got some money, and we told them to come in the next day.

Q. How much did you pay them?

A. \$2; it was to hold them over night.

406 Q. Now I notice that Wright, the engineer, signed last; did he come in later than the others?

A. He came in later.

Q. Was this protest read over, or the contents told to all who signed?

A. To all of them.

Q. To the other four who did not sign was it also read?

A. Yes.

Q. Was Mr. Moran with you at the time that was done?

A. Mr. Moran was with me.

Q. One of the sailors by the name of Redburg, as near as I can read it, signed; did you have any conversation with the other four sailors in regard to signing it?

A. Well, the captain signed first.

Q. Yes.

A. Then the mate.

Q. Yes.

A. Then the cook; I believe that is the order.

Q. The captain, the mate and the cook, yes.

A. Then one of the sailors.

Q. Redburg?

A. Redburg.

Q. Yes.

A. He signed it.

Q. What about the other sailors?

A. As it came to the turn of the others, why they wanted to know what was in it before they would sign it; they were told there was nothing in it.

Q. Was Mr. Pendleton there at the time?

A. I don't think so.

Q. Did they ever see Mr. Pendleton before that time, the 10th of August?

A. I don't think so.

Q. Go ahead with the conversation.

A. Then the crew left.

Q. You told them there was nothing in it?

A. I told them there was nothing in it.

Q. Did you ever see the men again?

A. Two of them.

Q. What were their names, do you remember?

A. I think it was Reichert and Democh.

407 Q. Were they the men who subsequently came up to Mr. Goodrich's office?

A. Yes, sir.

Q. How long afterwards was it, do you know?

A. If my memory is right it was the latter part of October the same year.

Q. Did they go into your office, or did you go out and find them?

A. They came into my office.

Q. Did you have any conversation with them then?

A. I heard them ask for some money, \$50 apiece, stating that they could get it elsewhere, from the Insurance Company.

Q. The other two sailors, what became of them?

A. I don't believe I ever saw them since.

Q. The \$2 that was paid them on the 9th was on account of what?

A. Their wages.

Q. Did they get the balance?

A. They got the balance the following day.

Q. Did you ever pay them anything else?

A. No, sir.

Cross-examined by Mr. Englar:

Q. Who was it asked what there was in it?

A. One of the sailors, I am not sure of his name; I can't recall his name. He was apparently speaking as spokesman for the others.

Motion to strike it out.

Motion granted.

By Mr. Goodrich:

Q. Did Wright sign this paper later?

A. Yes, sir.

408 JOSEPH F. MORAN, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

- Q. What is your business?
A. Stenographer.
Q. And in whose office are you?
A. Mr. Pendleton's.
Q. How long have you been in Mr. Pendleton's office?
A. Going on fourteen years.
Q. Are you a Notary Public?
A. Yes, sir.
Q. Are you the Notary that made the marine note of protest marked Respondents' Exhibit F?
A. Yes, sir.
Q. Is that in your handwriting?
A. The protest itself is not, no, sir.
Q. No—
A. The signature is.
Q. Did you typewrite the protest?
A. I did, yes, sir.
Q. Were you in the office when it was signed?
A. Yes, sir.
Q. Did you hear any talk from the four sailors who did not sign, about signing it?
A. Yes, sir; they wanted to know what was in it.
Q. One of them had already signed, had he not?
A. Yes, sir.
Q. And Wright came in later and signed?
A. Yes, sir.
Q. Did the four who didn't sign all talk, or was there one spokesman for them?
A. One.
Q. Do you know who he is?
A. A tall gentleman—
Q. Is it this man who is in Court?

Mr. Goodrich: Mr. Englar, will you ask him to stand up?

- 409 Q. (The man indicated has stood up.) Is it this man, Democh?
A. No.
Q. Was it the man Allmond, who was examined here the other day?
A. No, I never saw the fellow, no, sir.
Q. State the conversation?
A. After that Redburg had signed it—of course they were in a room with me—we called for the next man to sign it, and this other party jumped up and wanted to know what was in it, and of course we told him there was nothing in it; and that is all there was to it.
Q. Do you remember any of them subsequently coming into the office?

A. No, I never saw them.

No cross-examination.

JOHN W. BREWSTER, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. Goodrich:

Q. Mr. Brewster, what is your business?

A. Marine surveyor for the underwriters.

Q. And by whom are you employed?

A. By the Providence-Washington, St. Paul, Massachusetts.

Q. Did you make an examination of the schooner Edith Olcott in July, 1910?

A. No, sir.

Q. Is Captain Bagger in Court?

A. Yes, sir.

Q. And what is his business?

A. Marine surveyor.

Q. For whom?

A. Several companies.

Q. Do you know their names?

410 A. One, the Manheim, the Firemen's Fund, Union Marine, and Columbia, and Phoenix, and North Deutsche Lloyd, I think is the name.

Cross-examined by Mr. Englar:

Mr. Englar: I wish to examine Captain Brewster, now he is here, but as it is not strictly cross-examination I suppose I ought to let it go now.

Mr. Goodrich: I have here, if the Court please, Hydrographic Bulletins issued weekly for a period extending from May 4, 1910, Report 979, to October 19th, 1910, No. 1103. In them are reports of obstructions in the North Atlantic Ocean off the American Coast, and obstructions along the coast, over seals. I don't think it is necessary to offer them in evidence; I think we might make some statement on the record that the Hydrographic office reported during the summer of 1910, and reported plentifully, upon obstructions along the coast. My friends are at liberty to examine these; I don't know whether it is a matter of common knowledge of which the Courts will take notice that there are obstructions, and that many vessels strike them. The only testimony I have in the case about obstructions is the testimony of Wright, the engineer, who says that he felt a shock during the night of Tuesday; now nobody else on board heard it, and while I believe and shall argue before your Honor that that is what caused the loss here, and not lack of seaworthiness, I don't know how far I ought to go in the matter
411 of proof of the existence of obstructions. Can we come to any situation as to the contents of these things without putting them in?

Mr. Englar: I think it is a matter of which the Court will take

judicial notice that there are obstructions found in the ocean, that there are derelicts.

Mr. Goodrich: May I make a statement?

Mr. Englar: I think your Honor is perfectly entitled to read this Bulletin yourself.

The Court: Then put it in.

Mr. Goodrich: I call your Honor's attention to this item which occurs in each of the reports of obstructions over seals; it is not only derelicts, it is spars, trunks of trees, and obstructions much less in size than a derelict vessel. Apparently by the records from week to week there are reports of from five to fifteen derelicts each week, possibly some are duplications, along the route that the Edith Olcott took.

Mr. Englar: I offer in evidence two affidavits of the witness Wright, which he admits having signed. They are already marked Libellant's Exhibits 1 and 2 of May 1, 1913.

Mr. Goodrich: I object to their going in evidence, as incompetent; the witness has already been examined; I have not examined the affidavits.

Mr. Englar: The witness admits he signed them at the time he gave his deposition.

Mr. Goodrich: I submit that that doesn't make them evidence.

412 They are marked Libellant's Exhibits 5 and 6 of this date.

Mr. Goodrich: I wish to call the Court's attention to the signatures of the witness Wright, and the testimony will be commented on from the state of ebriety or inebriety of the witness when he signed them.

HARRY DEMOCH, a witness for the libellant, recalled:

By Mr. Englar:

Q. Were you among the sailors who were at Mr. Pendleton's office when this protest was drawn up?

A. Yes, sir.

Q. Prior to that time had you seen any representatives of insurance companies?

A. No, sir.

Q. Were you asked to sign the protest?

A. Yes.

Q. Did you give any reason for not signing it?

A. Yes.

Q. What reason did you give?

A. Well, it wasn't true, what was in there.

Q. What part of the statement wasn't true?

A. About the pumps.

Q. Did you ask for any money at that time?

A. No, sir.

Q. Did you ever ask anyone for any money in connection with this case?

A. No, sir.

Q. Now, what were the circumstances under which you got to Mr. Pendleton's office again?

A. I met a shipmate who was with me in the schooner Mary E. Grant; I paid off in New Haven and I paid my way to
413 New York, and I lived at 507 Vestry Street; I went to look for a job in the morning on South Street, and I met Reichert, and he said, Harry, I am looking for you; I said, You do? He said, Yes. I said what is the matter? He said, Mr. Pendleton wanted to see us, he is coming down from the State of Maine; I said, All right, I will go. He says, He wants everybody, let us hunt up Wright too; and we couldn't find him; so we went up there.

Q. To Mr. Pendleton's office?

A. Yes, sir.

Q. What took place at that time?

A. Well, we come in there, and I don't know who it was, one of the men showed us in the private room; he was sitting there, and one gentleman come in and give us a cigar, and we was waiting there and waiting there; and we asked one of the men how long they wanted us to wait; he said Mr. Pendleton would be there pretty soon, and I guess it was about 11 o'clock, or about noon, Mr. Pendleton came in; I don't remember the man any more; Reichert told me it was Mr. Pendleton. He said, Well, boys; he talked about what jobs we had on the boat, about the weather; he said, Well, boys, why aren't you going to sign this protest; and I said, as before, it ain't true, what is in there; and Mr. Pendleton said, What do you care? And I said, I care a lot; I ain't going to sign it. And Mr. Pendleton said, Wait, I am going to take you up to a friend of mine; and I said, All right, sir; and another gentleman came in and asked if we smoked cigarettes, and he threwed us a box, and said, Help yourself, boys. And we was sitting there about 12 o'clock and someone says, Boys, I don't think you had
414 dinner yet, and we said, No, sir; and he sent another man and said, You take these boys out and give them a good dinner and fetch them right back; and we went out and had our dinner and came back; and Mr. Pendleton says, I am going to take you up—we was waiting there an hour, or an hour and a half still; and Mr. Pendleton says, Now, tell me the reason why you ain't going to sign it. Well, I told you, I said, it ain't true; and he said, Did anybody promise you anything for not signing it; and Reichert said, Yes; and he said, Who was that? and Reichert said, The Insurance Company promised \$50. And Mr. Pendleton says, I am going to see what I can do for you boys, I am going to take you up to a friend of mine. So we went up to a lawyer's office; I found out afterwards and the lawyer asked us why it was we wouldn't sign it, and Reichert spoke to him; so the lawyer said, You want money for this, do you, you want money out of this,

do you? Reichert said I didn't ask for anything. So the lawyer told us to get out of there. Then I spoke; I said, Well, I didn't come in here at all, Mr. Pendleton fetched me up or I wouldn't have come here at all; so I went out.

Q. But Mr. Pendleton said he would see what he could do for you?

A. Yes, Mr. Pendleton told me—it was in the morning—if I wanted an engineer's job, or second mate's job I can have it any time I want it. I said I didn't want an engineer's job.

Q. As a matter of fact, have you received anything except your travelling expenses and a dollar and a half a day while you were here?

A. That is all I got for it.

Q. How do you happen to be here; how was it that you happened to be in Court to-day?

A. Well, I didn't know nothing about it; I sail on the
415 Lakes, and I was in Tonawanda, and I met an old ship's mate, used to sail on the coast with me, and he got a letter from Hoboken, and told me that Mr. Bigham, Englar & — was wanting me in the case of the schooner that was lost; and I said, All right, I am going to drop a letter down and see what he wanted so I sent a letter down, and the day after, I guess it was, Mr. O'Neill came up to me.

Q. This gentleman here (indicating Mr. O'Neill)?

A. That gentleman right over there; and I didn't know him at all.

Q. He came to Buffalo?

A. He came to Tonawanda.

Q. When was that, do you know?

A. I don't;—let me see; I think it was just after Labor Day.

Q. This year?

A. Yes, sir.

Q. Had you been in touch with us in any way before that?

A. Never, never, no, sir.

By Mr. Goodrich:

Q. Is this the Mr. Pendleton you talked with in the office (indicating Mr. F. S. Pendleton)?

A. I can't remember, sir.

By Mr. Englar:

Q. You have heard the testimony here to-day about the suction pipe in the hand-pumps?

A. Yes, sir.

Q. In view of that do you still testify that the suction pipe which was taken out was rusted through?

Objected to.

A. I was surprised when I heard it was galvanized; it was all rust—when we pulled it out, the whole pipe was all rust.

416 Q. Is this the letter which you wrote in response to the letter from the Seamen's Union?

A. Yes, sir.

The letter last referred to is offered in evidence and marked Libellant's Exhibit 7, of this date.

HARDWICK A. BAGGER, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Englar:

Q. Just state briefly, Mr. Bagger, what experience you have had on sea and land, and in what capacities?

A. I started to go to sea when I was 15 years old, and kept at it for 27 years, in all capacities, and the last 14 or 15 years I was master; then I done a job taking an old condemned vessel across for the National Board of Underwriters, and after that they gave me a job ashore; and I was with them for 12 years as inspector and surveyor; and now I have been for a little over 7 years with F. Herman's office.

Q. During your experience at sea you were a sailing master, weren't you?

A. Yes, sir, on sailing ships.

Q. Now, just tell us, in a general way, what this job was that you did in taking this vessel across; what sort of vessel she was and what you had to do?

Mr. Goodrich: I think it may be a very interesting experience, and I would like to hear it after Court closes, but isn't it somewhat immaterial?

417 Mr. Englar: I think your Honor will find it material in this case; it is an experience which bears directly on this case and shows what hand-pumps will do.

Q. Just state what condition the vessel was in as to leaking, and what if any pumping you had to do?

A. It was a condemned—well, bark, Italian built, but under Norwegian flag, that was sold——

Mr. Goodrich: I object.

The Court: Tell us what you did.

A. (continued). The vessel leaked 3½ inches an hour when I took charge of her; she was bound across; she had a windwill pump and two hand-pumps, and we pumped her across.

Q. You had no steam pumps?

A. We had no steam pumps.

Q. Did you get safely to Queenstown?

A. We got safely to Queenstown, after 45 days.

Q. What port did you sail from?

A. Sapelo.

Q. Where is that?

A. Between Darien and Brunswick, Ga.

Q. You had no steam pumps?

A. We had no steam pumps.

Q. About how large a vessel was she in comparison with the Edith Olcott?

A. She wasn't as large as the Edith Olcott; I forget her tonnage now, she was some 600 tons, thereabouts.

Q. About what proportion of the Edith Olcott's tonnage did she have?

A. You have had the Edith Olcott here with three different tonnages, I don't know which is the right one; if the nine hundred and something is right, the bark Winnifred would be about 2-3 of her tonnage.

Q. The bark Winnifred is the one you took across?

418 A. The bark Winifred is the one I took across.

Q. Now, Captain, have you recently looked up the dimensions of the Edith Olcott as given by the American Blue Book of Shipping?

A. Yes, sir, I looked it up some days ago, but I couldn't give it exactly.

Q. Well, did you, with those figures before you, make a calculation to determine about how much water two hand-pumps would take out of her for an hour if kept going?

A. If the hand-pump was in good order, yes.

Q. Well, how much?

A. Well, each pump would clear the vessel of about two inches per hour.

Q. Now, there has been testimony here that a man can only keep pumping by a hand-pump for about 20 minutes; what do you know about that?

A. It depends on how hard he is pumping; and in the second place, if he is keeping pumping as hard as he can he will want a breathing spell after 20 minutes; but as a rule there are two sets of men, and when one knocks off the other takes hold.

Q. Now, to keep the pumps running at the usual rate of pumping, how long can a man keep at it?

A. I should say at a hand-pump you should have four men to each pump.

Q. Could they keep it going?

A. Just as long as they could do without sleep; of course that is an emergency.

Q. Have you had any experience with hand-pumps?

A. I have; we have been at them close to 70 hours, and kept at it until we got in.

Q. There is testimony in this case that modern schooners don't have any hand-pumps; what do you know about that?

419 A. They wouldn't be seaworthy without them.

Q. Did you ever see one without them?

A. No, sir.

Q. Why is it that when they have steam pumps they are required to have hand-pumps?

A. Well, the steam that they have on board of a schooner is only what you call a donkey; it is only an assistant; it isn't a large engine like you have in a steamer; you don't have, as a rule, a com-

petent engineer, you have a man, as a rule, who acts as second mate and engineer; as a competent engineer he would get double the wages by going on a steamer from a sailer, so naturally that class of men don't go on schooners.

Q. Under those circumstances is the steam equipment liable to get out of order?

A. It is liable to get out of order.

Q. During your experience at sea, Captain, have you ever had any occasion to observe what sort of shocks to a vessel will be felt by those on board the vessel?

A. Most anything you hit with a vessel you will feel it on board.

Q. In your opinion is it possible that a vessel could hit any obstruction with force enough to damage her, assuming that she is a seaworthy vessel, and cause her to leak, without its being noticed by persons on board who were awake?

A. No.

Q. In this case, Captain, the schooner started to leak, and when the weather got worse the leak got worse, when the weather got better the leak decreased; does that indicate anything to your mind as to whether the damage was due to striking an object or to the vessel's opening a seam or butt?

A. It would indicate that there was a weakness in the vessel, or there is a leak above the normal water line.

420 Q. Would a collision striking the vessel below the water line be likely to produce results of that kind?

A. No, not as I look at it, a collision ought never to make a vessel spring a butt or anything like that; that leak would be continual, it would continue, and if anything be growing worse all the time.

Q. Captain, in this case it appears that the schooner over a period of four or five days was increasing the water in her at a little over an inch an hour, say an inch and a fifth an hour on the average; she had one steam pump going during that time; will you state whether a leak of that kind could be handled with two hand-pumps in good order?

A. Easy.

Mr. Goodrich: If your Honor please, I object as an incorrect statement of testimony.

Objection overruled.

Q. It has been testified Captain, that when a vessel is as deep as 24 or 25 feet that hand-pumps cease to be efficient; do you know anything about that?

A. It is recognized that 27 feet is about as much as you can work a pump on.

Q. In 24 or 25 feet, will they work efficiently?

A. Yes, a little harder, naturally, but they will work all right.

Q. How deep was this vessel which you took across the Atlantic?

A. I cannot tell you the exact depth, but to my best recollection she drew 21 feet, and she had quite a freeboard, I should say fully 5 feet freeboard, 5 or 6 possibly.

Cross-examined by Mr. Goodrich:

Q. Was this vessel which you took across a keeled vessel?

A. Yes, sir.

421 Q. Are you an inspector for one or more of the Companies that are on this risk?

A. Yes, sir.

Q. Did your Companies insure this vessel?

A. I understand they had some risk on her cargo.

Q. Did you make the examination and report when this insurance was placed?

A. No, sir.

Q. You haven't examined the vessel?

A. No, sir.

Q. Did you ever see her, Captain Bagger?

A. To the best of my knowledge I haven't seen it; I must have passed by her at the wharf and seen her in that way, but never examined her.

Q. Never made a report on her?

A. No, sir.

Q. Never during her career?

A. No, sir.

Q. What was the amount of suction on the bark you took across?

A. I don't know, sir.

Q. Was it about 14 feet?

A. It was a good deal more than 14 feet.

Q. An actual suction?

A. Yes, sir.

Q. How much more?

A. Well I cannot tell you, sir, I never measured it; but it was quite a deep vessel.

Q. You have known of cases where the sea has been so rough that the men couldn't man the pumps?

A. I have seen it so rough that we had to lash ourselves to the pumps.

Q. Have you never heard of a vessel striking an obstruction with no one on board knowing it?

A. No, I don't think I ever heard of that case and nobody knowing it—not a sailing vessel; I have heard of a steamer striking something with her propeller without knowing of it.

422 Q. But in a sea rough and tempestuous, the decks rolling, with water tumbling upon them, might it not be that the vessel would strike an obstruction without feeling it?

A. No, I don't think it would; I think it would be a distinct or different noise or jar, or whatever you call it, something that you couldn't fail to notice.

JOHN W. BREWSTER, being duly sworn and examined as a witness for libellants, testifies:

By Mr. Englar:

Q. You are a marine surveyor, Captain?

A. Yes, sir.

Q. What experience have you had at sea?

A. 25 years master.

Q. Of what classes of vessels?

A. Sail and steam vessels.

Q. How long were you in sail vessels?

A. 8-9 years.

Q. As master?

A. Yes, sir.

Q. Did you ever hear of a case, Captain, of a sailing vessel striking some obstruction so as to cause her to leak without anyone on board feeling it?

A. No, sir.

Q. In your opinion is it possible?

A. I don't think it would be possible to strike anything that would make it leak without someone detecting it.

Mr. Goodrich: Detecting it from what?

The Witness: Well, from the shock.

Q. There is some testimony in this case, Captain, about a circulating pump with a three inch suction leading down into the hold; are you able to state about how the pumping capacity of that pump would compare with an ordinary hand pump?

A. Well about equal to one ordinary hand-pump.

423 Q. Did you ever heard of a schooner without hand-pumps?

A. No, sir.

Q. Have you ever had any experience in the use of hand-pumps?

A. Oh, yes sir.

Q. Have you had such experience in connection with vessels that were full of water?

A. One vessel her lower hold was full of water.

Q. Do you know how high the deck on which the pumps were was above the bottom of the vessel?

A. About 20 feet.

Q. How much water did the vessel have in her?

A. With the hold full I think she had about 15 feet of water in her.

Q. Did you pump her out with hand-pumps?

A. Yes sir.

Q. Did you have any other pumps?

A. Yes, sir.

Q. Did you use them?

A. Yes, but they kept breaking down all the time.

Q. And you pumped the vessel out with the hand-pumps?

A. Yes sir.

Q. Was there any difficulty about using them at that height?

A. Didn't seem to be any.

Q. That is true until you pumped her right out, is it?

A. Pumped her down until she sucked.

Q. Are you able, Captain, to form any estimate—in the first place do you know in a general way the dimensions of the Edith Olcott?

A. No, I don't; I think she was about 190 feet and 40 feet beam,

and I think she was 21 feet deep; but that is only about; I couldn't say positive.

Q. Assuming that her dimensions are of that general character, can you form any proximate idea as to how much water two hand-pumps would take out of her in an hour?

A. About $4\frac{1}{2}$ to 5 inches.

424 Cross-examined by Mr. Goodrich:

Q. When you are speaking of the rates of capacity of a steam pump and a hand-pump of the same suction, same diameter of suction pipe, you are speaking, are you, of the theoretical efficiency of the pump?

A. No, not exactly.

Q. Isn't steam rather more efficient than hand labor?

A. If it works.

Q. Steam isn't as likely to be interrupted by weather?

A. If it is located in the forward house it is.

Q. If the forward house is protected?

A. But there is where the water was coming down.

Q. The testimony is that the messenger pump was run almost continuously.

A. It was amidships.

Q. But the circulating pump was protected in this ship, and was going?

A. Yes sir.

Q. What Companies for which you inspect were on this risk?

A. I heard after the vessel was lost the Providence-Washington was on it.

Q. Is that the only one for which you inspect that was on the risk?

A. Yes sir.

Q. It is true that you did not inspect her until she was——

A. Not since 1905; I saw her in June, 1906, in Tietjen & Lans's drydock, but I asked Captain Harris what they were doing and he said they were painting her bottom.

Q. Did you make any report before 1910?

A. I made this report—Vessel on drydock having small repairs.

Q. And you said nothing to give any impression of unseaworthiness to your Company?

A. No sir, I never said a word——

Q. You never made any criticism of the vessel before she sailed?

A. No, no.

425 Q. Did you ever hear of a vessel the Edith L. Allen?

A. Yes sir.

Q. Did you ever hear of her striking an obstruction?

A. Yes, sir.

Q. And did those on board know that she had struck something?

A. I guess they did; she commenced to fill pretty quick.

Q. But did they feel the shock?

A. I don't know, I wasn't there; I can't say.

Q. You have told someone here within a couple of hours that that vessel struck something?

A. I wasn't asked.

Q. I mean in private talk, outside of this room?

A. Please say that again, sir.

Q. Do you know of the William J. — striking an obstruction?

A. No, sir; I know the boards——

Q. Did anyone on board know by any sign that there was——

A. There was no one on board; she was towed in by a Revenue cutter.

Redirect examination by Mr. Englar:

Q. How long can you keep working at hand-pumps, Captain?

A. About 20 minutes.

Q. Then have to quit?

A. Have to for a spell.

Q. How long?

A. Five or ten minutes; it depends on how strong you are.

Q. How long can you keep it up that way?

A. Two hours at the wheel and two hours at the pumps, two hours at the pumps and two hours at the wheel, reverse it; two of us.

Q. How long would you keep that up?

A. Four hours.

Q. How much pumping would you put in during the day?

A. When the next watch come they would spend their time the same way.

426 Q. In other words you would spend half your time at the pumps?

A. Yes.

Q. In a vessel of the size of the Edith Olcott would a strong breeze, or even a moderate gale, with the sea which such weather would produce, interfere with working the pumps on the poop dock?

A. Not unless it was a hurricane; ordinary 30 or 40 mile breeze you could stay there and pump, I guess; the pumps are located aft in a good place out of water; I don't see how you shouldn't stay there and pump.

Mr. Englar offers in evidence the statement attached to the deposition of William George Smith; it is an exhibit attached to that deposition and consists of a written statement in Ward's handwriting, signed both by Ward and by Smith, dated 26th August, 1910.

Mr. Goodrich: Objected to. These witnesses have been examined and this paper has never been the subject of cross-examination. It is attached to a deposition, and I don't think it is competent evidence.

The Court: I will take it.

Exception.

(*Sur-rebuttal.*)

427 WILLIAM J. FLETCHER, for the respondents, recalled.
By Mr. Goodrich:

Q. Have you ever known of a vessel striking an obstruction at sea and knowing nothing of it at the time?

A. No, sir, didn't know it.

Q. Didn't know it at the time?

A. No, sir.

Q. Give the instance, tell what it was?

A. I left this place bound for Trinidad, Port of Spain, with a general cargo in 1884, in the schooner S. C. Pendleton; at that time she was two years of age; on our passage over we made the passage all right; didn't discover any leak at all, made the passage over to Mobile, Alabama from Port of Spain, and after I loaded the vessel with lumber for this place, off Shooters Island down there in Jersey, we got down off of Florida Straits, and the vessel sprang out aleak; well I tried every conceivable way to find it, for I knew the vessel was all right, but she continued to leak.

Q. Had you been conscious of striking anything?

A. No, sir.

Q. Knew nothing about it whatever?

A. No, sir.

Q. Didn't know the cause?

A. No, sir.

Q. Be brief about it, what did you subsequently find.

A. When we got away I went up to Shooters Island, I was loaded for the Seaboard Lumber Company at that time, they controlled that place; I told the boss—

Q. Just tell what you found, Captain, at the end?

A. Well when I took the vessel out, I found that something of a sharp nature had struck the vessel about 3 feet underneath the water line, when she was light, on the luff of the bow, thus
428 taking that plank up 20 feet, the centre of it, out, for about 2½ inches; and it went into the seam and ripped the oakum out and left her, and then the force of water pulled the oakum out and she commenced to leak, and the longer it was exposed the worse she leaked.

Q. Was that the only experience you ever had?

A. No, sir.

Q. Had another?

A. Yes, sir.

Q. Was was that?

A. I was in the barkentine Francis; she was a vessel that carried about a thousand tons of coal; she was one of those coffee traders that run to Brazil from Baltimore, she was a metal vessel, metalled up 2 feet above water, I mean the water line when she was light; I took a load of coal in in Norfolk and sailed, and when I got over within about a hundred miles of Aleco the vessel sprang aleak and increased until I got to Port Tampa, and when we took the coal out

we found about 2 feet just about on the water line—she was coppered up 2 feet above—that had taken the copper off and went right into the plank and into the seam; and dug it out, the oakum; and we could just hold the vessel when we got there.

Q. Had you known anything about the cause of it at the time it happened?

A. No, sir.

Q. Have you ever had any other experience?

A. No, sir.

Q. When you say a metal vessel, you mean she had a copper bottom?

A. A copper bottom, yes, sir.

Q. How far did it come up?

A. Two feet above the light water mark.

Cross-examined by Mr. Englar:

Q. How much water did you have in either of those vessels at any one time?

429 A. Well we kept her bailed out, after we see that she was leaking.

Q. How fast did she leak—either of them?

A. 150 to 200 strokes per hour.

Q. Of what kind of pump?

A. Well, hand-pumps.

Q. Which one was that?

A. Which one was it?

Q. Which vessel was that?

A. That was the barkentine Francis.

Q. And how about the other one, how fast did she leak?

A. The Pendleton.

Q. Yes.

A. Well, after she commenced, she commenced on very little she was a vessel that didn't leak any, but the first we noticed, at eight bells we alw-ys try the pumps, and we found the vessel had some water in her, a little and we pumped; and after that we kept trying it every watch, that is every change of the wheel, two hours.

Q. How much did you have to pump every two hours?

A. It increased; at first we wouldn't pump a great deal, but at the end of the voyage it kept us running all the while.

Q. It kept you running one hand-pump all the time?

A. When we arrived at the end of the passage it was all we could do to keep it out with both pumps.

Q. Did she have any steam pumps?

A. No, she had no steam aboard of her.

Q. The water never rose in the vessel at all?

A. No, after we found she was leaking we kept it out the best we could.

Q. How large were they?

A. The barkentine Francis carried a thousand tons.

Q. Was she as large a vessel as the Olcott?

A. No, sir, the Olcott carried 1,800 tons.

430. Q. How large was the Pendleton?

A. The Pendleton carried 700 tons.

By the Court:

Q. What do you suppose hit those vessels?

A. Well I think it must have been a submerged spar, or something of that kind.

Q. It wouldn't be a floating hulk of a vessel?

A. It might have been some spar hanging from a water logged vessel, I couldn't say; but from the way the Francis was it was probably some iron that struck the copper, because you could see the rust on it.

FIELDS S. PENDLETON, for the respondent, recalled.

By Mr. Goodrich:

Q. You are interested in a number of vessels?

A. Yes, sir.

Q. Have you seen a vessel which had met a disaster at sea by striking an obstruction?

A. Yes, sir.

Q. What vessels have you seen?

A. The Blanche King, the Woodward Abrahams and the William J. Lermond.

Q. You weren't on the vessels at sea?

A. No.

Q. What did the masters report to you about knowing of hitting an obstruction?

A. They said they hadn't hit anything. The Blanche King left with a cargo of stone for Jacksonville; she got down off Barnegat and they started pumping, and the wind come off heavy, and I had a cable from him in San Juan, Porto Rico, saying that he was leaking very bad, and he said it was impossible to proceed; and she was loaded at Clinton, bound up here. That is about three years ago.

431. Q. Did you go and look at her?

A. No, sir, I cabled the captain to throw the cargo away, or sell it for the most he could get for it, and he did so, got the United States Government to take it at San Juan, Porto Rico, and he wrote me that he thought the vessel was strained in the bottom, or something, and I knew that there was some trouble about that, for I knew the vessel, and I telegraphed him to come to Jacksonville after discharging the vessel, to come over light and not to haul the vessel until I got there; I hauled her out on *on* drydock, pulled her out, and right on the port side, about a foot and a half under the light water mark I took my hands and hauled the plank right out, something had gone into the timber, for a place about 2½ feet square and that is what was damaged; it went right into the timbers, and we repaired the damage.

Q. Had those on board known anything about it?

A. Hadn't heard nor seen anything about it.

Q. What were the other instances?

A. I had the Woodward Abrahams, about three months ago, loaded with a cargo of guano, put into Key West, Fla., and I received a cable from the captain that he was leaking, and a letter stating that he didn't know what it was, that she had started about three days off of Curacao, and he was compelled to put into Key West for more pumps; and when he got in Baltimore I went over to see what was the trouble; I found she had struck something under the bow, and it had gone along under her plank and followed the seam along until it came to a butt, and when it struck the butt it kind of went up into the plank and dodged out.

Q. Did those on board know anything about it at the time it happened?

A. Not a thing.

432 Q. What was the other?

A. The J. L. Captain Brewster was down to Norfolk at the time; we towed her in by the Revenue cutter and her boards were knocked in, there were the scars on her bulkhead where the thing hit her.

Q. Was there anybody on board of her at the time she met with the—

A. Yes, the crew after she filled with water, cut away her spars and abandoned her.

Q. Did they know anything about what had hit her?

A. No, sir.

No cross-examination.

Case closed.

Briefs to be submitted, and case summed up at 10:30 Monday, October 20, 1913.

433 LIBELLANT'S EXHIBIT 4.

(October 13-13.)

Pendleton Bros.,
Ship Brokers & Commission Merchants,
130-132 Pearl Street.

Cable Address: Fielybros, New York. Watkins' Code and Appendix.

Long Distance Telephone, 486 Broad.

NEW YORK, December 12th, 1911.

Mr. Richard Ward, No. 31 Cornett Road, Aintree, Liverpool, Eng. from Mrs. Ward advising me that you were due at Las Palmas and I wrote you to that Port requesting that when you arrived in England to advise us the most economical way that we could arrange to get your testimony in the "Edith Olcott" case. It is very probable that we shall have to defend a suit and we would like to arrange to get your statement in accordance with our conversation at Norfolk. We do not know that this must be done hurriedly for we think there

will be plenty of time. We shall know that in a month or six weeks and will then advise you. In the meantime we would be pleased to hear from you as to whether it will be feasible for you to come to the States or if we would be compelled to take it in England.

We received a letter from Capt. Johnston dated Cardiff, Nov. 24th and have written him today. We infer from what the master states a statement has been requested from him and we have asked him to see that the facts which are favorable to our side are not smothered or taken advantage of. I regret to state that I have had a great deal of trouble recently and have been away from the City the major

part of the time for the past 5 months. I shall be pleased to
434 receive a letter from you and ask that you keep me advised of your whereabouts so I may communicate with you again as soon as I ascertain the time we should arrange to get your statement.

Thanking you for your courteous interview and good wishes at Norfolk, I beg to remain,

Very truly yours,

LIBELLANT'S EXHIBIT 5.

(Oct. 13, 1913.)

"Edith Olcott."

STATE OF NEW YORK,

County of New York, ss:

George Wright, being duly sworn, deposes and says, that he was engineer on the schooner "Edith Olcott" at the time she was lost at sea in August last. That he shipped on the vessel only a couple of hours before she sailed and had no opportunity to inspect her; that

G. W.

W. G. B.

when she got out to sea, he found her leaking and he tried to get the steam pumps to working, but they would not throw any considerable stream of water. Upon noticing this fact, he went down into the hold and examined the suction pipes, and he found that all of the suction pipes attached to the steam pumps were perforated, having been rusted through. He then hoisted up the hand pumps and found that the suction pipes of the hand pumps were in the same condition. There were five suction pipes altogether and all of them were so perforated with rust holes that it was impossible to keep the vessel pumped out. The vessel was not fit to go to sea, as her pumps were in such a condition as to be practically useless.

I have never at any time prior to October 22nd, 1910,
435 signed any statement with reference to the loss of the "Edith Olcott;" if there is any statement, affidavit or protest purporting to be signed by me prior to that time it is not genuine.

GEORGE WRIGHT.

Sworn to before me this 24th day of October, 1910.

WILLIAM G. BANNON,
Notary Public, New York County.

LIBELLANT'S EXHIBIT 6.

(Oct. 13, 1913.)

"Edith Olcott."

STATE OF NEW YORK,

County of New York, ss:

George Wright, being duly sworn, deposes and says, that he was engineer on the schooner "Edith Olcott" at the time she was lost at sea in August last. That he shipped on the vessel only a couple of hours before she sailed and had no opportunity to inspect her; that when she got out to sea and began to leak, he tried to get the steam pumps to working, but they would not throw any considerable stream of water. Upon noticing this fact, he went down into the

W. G. B.—G. W.

hold and examined the suction pipes; he found that all of the suction pipes attached to the steam and hand pumps were perforated, having been rusted through. There were five of these pipes and all of them were so perforated with rust holes that it was impossible to keep the vessel pumped out. The vessel was not fit to go to sea, as her pumps were in such a condition as to be practically useless.

436 I have never at any time signed any statement with reference to the loss of the "Edith Olcott" up to this time; if there is any statement, affidavit or protest purporting to be signed by me it is not genuine.

GEORGE WRIGHT.

Sworn to before me this 22nd day of October, 1910.

WILLIAM G. BANNON,
Notary Public, New York County.

LIBELLANT'S EXHIBIT 7.

(Oct. 13, 1913.)

NORTH TONAWANDA, 9/3/1913.

To Messrs. Harrington, Bigham & Englar.

DEAR SIR: Through the German Seaman's House, 64 Hudson Street, Hoboken, N. J., it came to my knowledge that you have inquired as to my whereabouts, concerning the case of the lost schooner Edith Olcott. I can inform you that my present address is c/o Lake Seaman's Union, North Tonawanda, N. Y. If I can be of any service unto you, kindly let me know. If my presence is required I must notify you that I can't go there, unless my expenses are paid, which

would be \$2.00 per day, besides railroad fare and hotel expenses.
Please write back at once, as I can't wait too long before I ship again.
Yours truly,

HARRY DEMOCK,
Lake Seaman's Union, North Tonaw., N. Y.

437

RESPONDENTS' EXHIBIT A.

(Oct. 13, 1913.)

The Anglo-American Telegraph Company, Limited.

Incorporated 1866.

Four Direct Cable Routes Between The United States of America
and Europe.

Cablegram Received at No. 8 Broad Street (Stock Exchange
Building), New York.

196Z, Glasgow, 18

Dec. 22, 1911.

Fiely Bros., N. Y.:

Sail thirtieth five months' voyage cable residence by return sub-
stantial remuneration will resign berth important.

WARD.

(12:23 P. M. W.)

RESPONDENTS' EXHIBIT B.

(October 13-13.)

31 CORNETT ROAD, AINTREE, LIVERPOOL, 1st Jan'y, 1912.
F. S. Pendleton, Esq., New York.

DEAR SIR: Your letter of Decr. 12th and cable of Decr. 28 to hand,
and contents duly noted.

I regret I did not receive your 1st cable of Oct. 23rd until long
after my arrival in England, and your letter to Las Palmas—not
received at all.

I think that in future, if you would address all communications
to my residence as above, my wife having first hand knowledge of
my whereabouts and our next port of call, will be able to immediately
forward any communication you may choose to send me.

438 In my last cable to you, Decr. 22, you will see I was quite
prepared to resign my present berth and if needful have gone
to the States, to testify as to the condition of the Sch. Edith Olcott,
as found by me when on board. Apparently you do not deem such
a step necessary at present—yet on my return to England I do not
think it would be advisable for me to resign and give my testimony

in the States, as I would then lose much seniority and opportunity in my present employ.

On the 30th ult. I had an interview with the agents of Harrington, Bigham & Englar, who desire a statement from Johnston and myself, but at the time were not prepared to make any. On my return to England, however, they purpose securing whatever testimony we possess, and believe me, Mr. Pendleton, that to the best of our ability we will not allow or assist any facts to be smothered or taken advantage of at any time.

I do indeed regret to hear you have had so much trouble recently, and I can but trust that with the dawn of this New Year—all troubles and yourself will be complete strangers.

Owing to the holidays our sailing is delayed until to-morrow.

Wishing you the compliments of the season and a joyous and Prosperous New Year, and thanking you for past courtesies,
Believe me,

Yours sincerely,

RICHARD WARD.

An acknowledgement of this letter would be appreciated.

439

RESPONDENTS' EXHIBIT C.

(October 13/13.)

31 CORNETT ROAD, AINTREE, LIVERPOOL, 21 May, 1912.

F. S. Pendleton, Esq., New York.

DEAR SIR: I must admit I consider your cable of the 14th inst. shows but little appreciation of the letters I have sent you since Jan'y 2nd, and as you have not as yet given me the opportunity to thank you for expenses already incurred, which you have offered to defray, I really could not see any benefit by further expenditures on my part in cabling you a reply. We do not call at any ports in the States or Canada, but just trade between Europe and Buenos Aires, this coming voyage lasting about 3 months.

While not forgetting, I have in my previous letters omitted to ask you if you have done anything in the matter—for the U. S. Government to recognize our services in some suitable way.

If you have any reply—as usual send to above address and same will be forwarded to me.

Thanking you,

Yours faithfully,

RICHARD WARD.

440

RESPONDENTS' EXHIBIT D.

(October 13-13.)

PORT OF LISBON, 5 June, 1911.

To F. S. Pendleton, Esq., New York.

DEAR SIR: Just a line or two to let you know I am "requested" by our Glasgow people, through Capt. Johnston, to prepare a full

and true statement concerning the loss of the schooner "Edith Olcott," same to be sworn to on our arrival in England, for the benefit of all concerned?

For the present I have refused.

Are your opponents attempting to rush things? On our way here we drew up a statement that will fully meet your case and we propose to have it attested before a notary should we hear from you in the meantime.

As a letter to us direct would probably miss us I give you our private addresses.

R. Ward, 31 Cornett Road, Aintree, Liverpool.

Capt. W. M. Johnston, 20 Balaclava Rd., Roath Park, Cardiff.
Trusting to hear from you,

Yours faithfully,

RICHARD WARD.

441

RESPONDENTS' EXHIBIT E.

(October 13-13.)

Pendleton Bros.,
Ship Brokers & Commission Merchants,
130-132 Pearl Street.

Cable Address: Fielybros, New York. Watkins' Code and Appendix.

Long Distance Telephone: 486 Broad.

NEW YORK, December 30th, 1911.

Mr. Richard Ward, No. 31 Cornett Road, Aintree, Liverpool (England).

DEAR SIR: We duly received your cable which came while the writer was away, and as soon as he returned sent you a cable reading as follows:

"Case will not come up for six or eight months. Your return will be soon enough. Writing."

Which we now beg to confirm.

We have ascertained that it will be sometime before the case will be brought up, as there has been no testimony taken, and presume it will be a year, six months at least before it will be necessary to get it in, and therefore have decided it would be much better not to trouble you at this time, for it would be time enough after you return on the voyage. We appreciate your kindness in sending us the cable and, of course, expect to pay such expenses. Please write us your location, and if you leave England about the time you will return and the ports you are going to.

Wishing you a Happy and Prosperous New Year, we are,
Very truly yours,

(Offered at p. — of the Record, But Not Marked.)

THE UNITED STATES OF AMERICA.

Protest.

STATE OF NEW YORK,

City and County of New York, ss:

To all people to whom these presents shall come, or may concern:

I, Joseph F. Moran, a Notary Public in and for the State of New York, by Letters Patent, under the Great Seal of said State, duly commissioned and sworn, dwelling in the City of New York, send greeting:

Know ye, that on the Ninth day of August, in the year of our Lord, one thousand nine hundred and ten, before me appeared Fred Wallace, Master of the Schooner called the "Edith Olcott," and noted in due form of law with me his protest, for the uses and purposes hereafter mentioned, and now at this day, to wit, the day of the date hereof, before me, at the City of New York aforesaid, again comes the said Fred Wallace and requires me to extend his protest, and together with the said Fred Wallace also come Wm. Harding, mate; Chr. Nielsen, steward; Geo. Wright, engineer; Oskar Redberg, seaman, belonging to the aforesaid schooner, all of whom being by me duly sworn on the Holy Evangelists of Almighty God, voluntarily, freely, and solemnly do declare and depose as follows, that is to say, that on July 30th, 1910 he the said Fred Wallace set sail and departed in and with the said schooner as Master thereof from New York, having on board the said schooner a cargo of general merchandise and bound for the

443 Port of San Juan and Mayaguez, Porto Rico; that the said schooner was then stout, staunch and strong; had her cargo well and sufficiently stowed and secured; was well masted, manned, tackled, victualed, appareled and appointed, and was in every respect fit for sea and the voyage she was about to undertake.

Nothing worthy of special note occurred until August 3rd comes in with very heavy South West wind with very heavy seas from same direction. Vessel laboring and straining heavily and shipping immense quantities of water. 10 A. M. reefed spanker, took in flying jib, wind and sea increasing. 1 P. M. took in spanker and furled it, wind becoming squally. Sounded pumps and discovered vessel making water. Set steam pumps working. After working pumps one hour sounded again and found leak increasing. Latter part wind and sea still increasing in force. Took in all sail except jib and forestaysail and kept vessel before the wind and sea to ease her.

August 4th. 8 A. M. wind and sea the same. Vessel laboring and straining and shipping considerable water. Leak still beyond

control of the pumps. Sounded pumps and found eight feet of water in hold. Steam pumps kept going continually. Noon wind and sea moderating somewhat. Steam pumps holding water in control at eight feet for the remainder of this day.

August 5th. Wind and sea more moderate. Running before wind and sea. Sounding pumps every hour finding water still at eight feet. Steam pumps continually working. 8 P. M. heavy squall from South West causing sea to rise rapidly. Vessel laboring heavily and shipping immense quantities of water. Leak again increasing on pumps.

August 6th. 8 A. M. finding pumps unable to gain on water and weather conditions appearing very threatening set signals of
444 distress. Position, Lat. 37.03 N. Long. 65.30. W. At

10 A. M. British steamer "King Edgar," bound to New York, hove in sight and came to assistance. Requested of Steamer's Captain for a tow to the nearest port, which was agreed to, for the compensation of Three Thousand Pounds Sterling. This offer, considering the condition of the vessel, had to be accepted. After a consultation of the steamer's Master and officers, it was decided, considering the weather conditions to tow vessel to New York as the most accessible port. Steamer sent wire tow line to vessel which was shackled to starboard anchor chain with forty-five fathoms of chain paid out. 4:30 P. M. proceeded in tow, steering a N. W. by W. course. Making a four to five knot progress. 5 P. M. heavy rain showers, wind breezing up from W. S. W. and sea making rapidly. 10 P. M. vessel plunging into head sea shipping large quantities of water and settling forward. Steam pumps going constantly. Sounded and found water gaining. Midnight wind and sea still increasing. Sounded and found ten feet of water in vessel. Vessel would not answer helm, was continually under water and settling. Engine room and cabin flooded.

August 7th. 4 A. M. sounded pumps and found thirteen and one-half feet of water. Tow line parted after having towed sixty-two miles. Steamer came up alongside and it was decided as useless to attempt to tow vessel any longer. Steamer offered to take crew off. Considering the serious weather, the condition of the vessel, she being now full of water and uninhabitable, it was decided for safety of their lives to take advantage of the steamer's offer and the vessel was abandoned. Position when abandoned four hundred and fifty miles South East by East from Sandy Hook.

Crew was taken on board the steamer, with considerable
445 difficulty using steamer's boat. It was impossible to save anything except the hired chronometer. The last seen of the vessel she was listed to starboard and settled heavily forward.

August 9th. All hands arrived at New York in the Steamer "King Edgar."

And the said Fred Wallace further says that, as all the damage and injury which already has, or may hereafter appear to have, happened or accrued to the said schooner or her said cargo, has been

occasioned solely by the circumstances hereinbefore stated, and cannot nor ought not to be attributed to any insufficiency of the said schooner or default of him, this deponent, his officers or crew, he now requires me, the said Notary, to make his protest and this public act thereof, that the same may serve and be of full force and value, as of right shall appertain.

And thereupon the said Fred Wallace doth protest, and I, the said Notary, at his special instance and request, do by these presents publicly and solemnly protest against winds, weather and seas, and against all and every accident, matter and thing had and met with as aforesaid, whereby, or by means whereof, the said schooner or her cargo already has, or hereafter shall appear to have, suffered or sustained damage or injury, for all losses, costs, charges, expenses, damages and injury which the said Captain, the owner or owners of the said schooner or the owners, freighters or shippers of her said cargo, or any other person or persons interested or concerned in either, already have or may hereafter pay, sustain, incur or be put unto, by or on account of the premises, or for which the insurer or insurers of the said schooner or her cargo, is or are respectively liable to pay or make contribution or
 446 average according to custom, or their respective contracts or obligations, and that no part of such losses and expenses already incurred, or hereafter to be incurred, do fall on him, the said Fred Wallace, his officers and crew.

Thus Done and Protested in the City of New York, this 10th day of August in the year of our Lord, one thousand nine hundred and ten.

In Testimony Whereof, as well the said appearer, as I, the Notary, have subscribed these presents, and I have also caused by Seal of Office to be hereunto affixed, the day and year last above written.

FRED WALLACE, *Captain.*
 WM. HARDING, *Mate.*
 CHR. NIELSEN, *Steward.*
 GEO. WRIGHT, *Engineer.*
 OSKAR REDBERG, *Seaman.*
 JOSEPH F. MORAN,
Notary Public, Kings County.

[SEAL.]

Cert. filed N. Y. Co.

I, Joseph F. Moran, a Notary Public in and for said State duly commissioned and sworn, dwelling in the City of New York, do hereby certify the foregoing to be a true and exact copy of an Original Protest on record in my office.

In Testimony Whereof I have hereunto set my hand and Notarial Seal this 15th day of August, one thousand nine hundred and ten.

JOSEPH F. MORAN,
Notary Public, Kings Co.

Certificate filed N. Y. Co.

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and
Fields S. Pendleton, Individually, Respondents.

Harrington, Bigham & Englar (D. Roger Englar, advocate), for
Libellant.

Henry W. Goodrich and William H. Gulliver, for Respondents.

HOLT, J.:

This action is brought to recover damages for the loss of a portion of the cargo of the schooner Edith Olcott, which was lost at sea on August 7, 1910. The libellant, The Benner Line, is a corporation engaged in the business of transporting merchandise between New York and Porto Rico and other southern ports. The respondents Fields S. Pendleton and Edwin S. Pendleton were copartners, doing business under the name of Pendleton Brothers. Fields S. Pendleton owned nine-sixteenths of the Edith Olcott. Edwin S. Pendleton owned no interest in the ship. The firm of Pendleton Brothers acted as agents for the owners, and as such signed a charter party, chartering the Edith Olcott to the libellant for a round
448 voyage from New York to Porto Rico and return, for the lump sum of \$3,500. The charter provided that "the said vessel shall be tight, staunch, strong and in every way fitted" for the voyage in question. The schooner, on Sunday, July 31st, left New York for Porto Rico. All went well until the following Wednesday, when it was discovered that there was about four feet of water in the hold. The amount of water continued to gradually increase until Saturday of that week, when the amount of water in the hold was about thirteen feet, and the ship was obviously in danger of sinking. A signal of distress was put up, the steamer King Edgar came to their relief, took the Olcott in tow, and attempted to tow her to New York, but after some hours of towing, the cable broke, and thereupon the crew was taken off, and brought to New York, and the Olcott abandoned. She thus, with her cargo, became a total loss.

The respondent, Edwin S. Pendleton, owned no interest in the schooner, and appears to have been sued simply because he was a member of the firm which as agents for the owners signed the charter party. I do not see any ground therefore upon which a suit can be maintained against him, and the libellant's counsel concedes in the brief filed that the libel as to him should be dismissed. I think that this suit may be maintained against the respondent Fields S. Pendleton, who was the owner of nine-sixteenths of the Edith Olcott, but that his individual liability under the act of 1884 amending the limited liability statutes is limited to the proportion

of the claims sued on that his individual share of the vessel bears to the whole; that is, he is liable for nine-sixteenths of the libellant's claim provided the libellant's right to recover generally is established and the defenses interposed are not maintained.

449 The respondent claims that the libellant cannot maintain this action on the ground that bills of lading having been issued directly to the shippers the charterer cannot maintain the action. The method of doing business by the Benner Line was this: The Benner Line advertised to transport merchandise to Porto Rico, and made contracts with shippers to that effect. With a sufficient amount of cargo had been contracted for, the Benner Line chartered a vessel, and directed the shippers to deliver their merchandise to the vessel. The shippers thereupon sent their merchandise to the vessel, and received shipping receipts which were subsequently exchanged for bills of lading. These bills of lading undoubtedly bound the ship. But the essential nature of the arrangement was that the shippers contracted with the Benner Line in the first instance. They did not select the vessel on which their goods were to be shipped. They sent their merchandise to whatever vessel the Benner Line directed them to send it. The vessel having been lost, the various insurance companies paid the various claims of cargo owners, and this suit is brought by the Benner Line nominally as bailee of the shippers, but actually in behalf of the insurance companies. Under the well settled practice in admiralty the carrier could have sued as bailee for the shippers. (The Beasonsfield, 158 U. S., 303; The New York, 93 Fed., 495.) If the carrier could sue as representing the shippers, I think it could sue as representing the insurance companies, which, by virtue of their payment of the claims of the shippers, were subrogated to the rights of the shippers.

The respondent also claims that the schooner was seaworthy when she sailed, and that therefore he is not liable for her loss. The charter party contained an express warranty of seaworthiness, 450 which, indeed, would have been implied if no such warranty had been contained in the charter party. The evidence shows that when the Edith Olcott was about four days out from New York she sprang a leak so serious that between the previous evening, when the usual soundings showed no water in her, and the succeeding morning about eight o'clock, four feet of water had entered the hold. This amount steadily increased during the following three or four days, although one large and one small steam pump were constantly at work, until there was about thirteen feet of water in the hold, and the vessel had to be abandoned in a sinking condition. The only explanation suggested as the cause of this leak is either that the vessel struck some submerged object or that the weather was so heavy as to cause the ship to leak. Wright, one of the officers, when examined nearly three years after the accident, testified, in substance, that about midnight of the night before the leak was discovered he felt a slight shock, and that he spoke of it to the mate, but did not really think at the time that anything had happened. No one else on the ship felt anything. No reference is made to this alleged shock in the protest which was made immediately after the crew reached New

York. No reference is contained in the answer to any such occurrence, but the answer alleges that the schooner "encountered perils of the sea, among other things, a very heavy wind and heavy sea, so that said vessel labored heavily, and such conditions continued until the morning of the fifth day of said August, during which time said schooner became greatly strained, causing her to leak." Indeed there is no evidence that any claim was made by anybody that the leak was caused by striking a submerged object until Wright testified

in May, 1913. That a vessel at sea may be struck by some
451 submerged object, causing a sudden leak is of course possible, but not very probable. That a sufficiently serious blow to

have caused such a leak should have occurred in such a manner as to have attracted the attention of one person on the ship without attracting the attention of any other seems to me also improbable. The fact that apparently no one upon the ship except Wright heard of such an occurrence at the time is very suggestive. Here was a ship with a crew of nine men, suddenly springing a dangerous leak. For several days, during which the lives of the crew were in imminent danger, every effort was made to overcome it, without success. The ship was finally abandoned in a sinking condition, and the crew brought to New York. Every detail and circumstance of such an event would naturally have been talked over by every one on board, and would have been remembered when the story was told at New York. The facts that only one man claims to have felt this alleged shock, that at the time he did not think it amounted to anything, and that there was no reference made to it in the protest or in the answer or in any account given of the occurrence at the time, makes it, in my opinion, impossible for the Court to give any weight to the claim that this leak was caused in that way. All that can be said is that it was possible; but in such a case the burden is upon the shipowner to show by satisfactory proof how such a leak occurred. The only other explanation of the leak is that given in the answer, that the schooner was subjected to such heavy weather that the straining of the ship caused the leak. But admittedly the weather was not heavy until the night before the leak, and although from that time until the ship was abandoned there was heavy weather, there was nothing so extraordinary about it that a ship in a proper condition

to make an ocean voyage should not have been in condition
452 to undergo the strain. The respondent has given elaborate

evidence to the effect that the ship was kept in very good condition; that she had been carefully inspected, overhauled and put in order before the voyage; and that she had a rating with the insurance companies as high as is ever given any vessel of her age. I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the facts that she sprang so bad a leak on the first night of heavy weather that occurred upon her voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage.

But a more serious claim of unseaworthiness is based on the action of her pumps. The schooner had on board five pumps, a steam pump

called the wrecking pump, another steam pump called the messenger pump, a small steam pump called the circulating pump, all forward, and two hand pumps aft, one on the port side and one on the starboard side. These pumps, according to the evidence of the respondent, had been actually used on the previous voyage and were carefully tried immediately before sailing, and all worked satisfactorily and efficiently. As soon as this leak began, the wrecking pump was started, and almost immediately broke down. This pump was run by a cogwheel, and almost as soon as it was started several of the cogs broke, so that it is claimed that the wheel would not engage the corresponding cogs, and that therefore the pump would not operate. No explanation is given why these cogs broke, or what was the appearance of the broken part. No attempt was made apparently to repair the broken part, or to substitute some other method of operating the pump. At all events, the use of that pump was thereupon abandoned, and never resumed. The messenger pump and the small circulating pump were then started, and apparently worked well during the entire period between the discovery of the leak and the abandonment of the ship, but did not discharge a sufficient amount to keep the water in the hold from steadily increasing. Immediately after the wrecking pump failed, the men started to use the hand pumps aft, both of which the evidence shows were in perfect order and pumped satisfactorily immediately before the voyage began. They began to work with the port hand pump, which very soon after they commenced pumping failed to operate. No explanation is given why it failed to operate. The captain says that perhaps the packing was too tight, but if that was the explanation there is no evidence of any effort to remedy the packing. At all events the use of the port pump was thereupon abandoned, and it was not used or tried afterwards. They then tried to pump with the starboard hand pump, and after a short time that ceased to act. The captain says that he suspected that there was some obstruction at the bottom of the pipe, and gave orders to have the pipe taken out. A tackle was rigged over it, and the pipe was pulled out up through the deck. This appears to have been a work of considerable difficulty. They were several hours in accomplishing it. The captain testified that the pipe was dented and bent in the operation of pulling it out, so that it could not be put back, and it thereupon was lashed on deck and remained lashed and unused thereafter. There is no explanation why it was so difficult to pull it out, or why it should have become jammed and bent and made useless by the operation of pulling it out. Especially there is no evidence that anything was found after it was pulled out that caused the obstruction which led to its being pulled out. No attempt seems to have been made to restore it to its original condition, and to resume its use. It is suggested that the hold was so deep that these hand pumps worked hard. But the evidence is that they worked well before this voyage, and as the water in the hold continually increased the distance through which the water had to be raised continually decreased. In view of all the circumstances in the

case, if a single accident to a single pump had occurred, it might be reasonable to attribute it to a mischance, but here were three powerful pumps proved to have been in perfect order before the vessel sailed, each one of which broke down immediately as soon as an attempt was made to use it, and no adequate explanation is given why they immediately broke down. I give no weight to the evidence of those members of the crew who testified that the pipe which was taken out was rusted and full of holes. The members of the crew who refused to sign the protest and who have testified against the ship were obviously a venal and dishonest lot. They were constantly offering their testimony for sale to the respondents, and I have no doubt that if their price had been paid they would have signed the protest and afterwards testified in the respondents' favor. I reject their evidence entirely. But the fact remains, in passing upon the question of the seaworthiness of this vessel, that three different pumps which it had provided to meet just such an occasion as arose in this case broke down immediately one after the other, and that there is no adequate explanation given why they broke down. The evidence tends to show that if either of these pumps which failed had worked to its full capacity the water could have been kept down and the vessel probably saved. In my opinion, under these circumstances the

455 inference is irresistible that the pumps which failed were not fit to use when the ship started, and that therefore the ship was not seaworthy at the beginning of the voyage. I have no doubt that the owners believed her to be seaworthy, and that Captain Fletcher, a very competent man, to whom the owners had entrusted the duty of putting the ship in order, believed her to be seaworthy. But the obligation upon the owners of a ship, according to the maritime law, is that a ship must be in fact seaworthy at the commencement of the voyage, and it is entirely immaterial whether the owners believe her to be seaworthy or have used every reasonable effort to make her seaworthy. If she was not in fact seaworthy when the voyage began the owners are liable under the general rules of the maritime law unless such liability is limited by the statutes limiting the liability of shipowners.

I think that the Harter Act has no application to this case. That act provides, in substance, that if a shipowner shall exercise due diligence to make the vessel seaworthy he shall not be held responsible for damage or loss arising from faults in the navigation of the vessel or from dangers of the sea. But there is nothing in the evidence to indicate that the *Edith Olcott* foundered because of any fault in navigation or from dangers of the sea, within the meaning of that expression in maritime law. She foundered, in my opinion, because she was not seaworthy. But the Harter Act does not undertake to impose any new liability on vessel owners for sending an unseaworthy ship to sea. That liability, as I understand the act, is left to be governed by the general rules of the maritime law.

456 The respondent alleges as a defense to this suit that he is exempted from liability, except to the extent of the value of the ship and the pending freight, by the statutes limiting the liability of shipowners. The libellant claims that the respondent can-

not avail himself of that statute because of the authorities which hold that the statute exempting a shipowner from liability are not a defense to a claim based upon the personal contracts of the shipowner. The charter party in this case was signed by Pendleton Bros., and the libellant's counsel claims that therefore the charter party was the personal contract of the defendant Fields S. Pendleton and his partner. But the cases holding that a shipowner is not entitled, by virtue of the statutes limiting his liability, to exemption from liability on his personal contracts, apply, as I understand it, to contracts which are strictly personal, and do not in terms bind the ship. For instance, in the case of *The Loyal* (198 Fed., 591, affirmed 204 Fed., 230), relied on by the libellant, the Jarvis Company, the owner of the *Loyal*, entered into a contract with the Apollinaris Company to lighten in and about the harbor of New York consignments of mineral waters to be received at New York by the Apollinaris Company. The contract did not specify any particular vessel by which the lightening was to be done. It would be complied with if the Jarvis Company provided any vessel to do the lightening, and it was immaterial to the Apollinaris Company what vessel was provided. It was therefore the strictly personal contract of the Jarvis Company, which imposed no obligation upon any particular vessel, and for liability under which the Jarvis Company could not exempt itself from responsibility by the surrender of any particular vessel. So in the case of *The Great Lakes Towing Co. v. Mill Transp. Co.* (155 Fed., 11), there was a general contract for towing entered into by the Great Lakes Towing Company. It was not a contract providing for towing by any particular vessel. In the other cases cited in which vessel owners have been denied the right to obtain exemption from liability upon contracts under statutes limiting the liability of shipowners, the contracts have been strictly personal contracts by which the personal credit of the shipowners was pledged. *Rudolf v. Brown*, 137 Fed., 106; *Gokey v. Fort*, 44 Fed., 364.) But in the case at bar the charter party signed by Pendleton Bros. was a charter party of the particular schooner *Edith Olcott*. Pendleton Bros., in signing that charter party, acted as the agents of the owners. The agreement was the owners' agreement chartering the schooner, and was an agreement made in the conduct of the business of the schooner. Under such circumstances, in my opinion, the charter party cannot be regarded as the mere personal contract of Pendleton Bros. It was the ordinary case of a charter party binding the vessel. In my opinion, the schooner was not seaworthy at the beginning of the voyage, but such unseaworthiness was without the privity or knowledge of the owner. The respondent therefore, in my opinion, is entitled to exemption from liability. The ship was a total loss. The evidence is not clear whether there is any pending freight to be surrendered. The evidence shows that most of the freight due from the shippers to the charterer was prepaid, but there were several consignments on which the freight was not prepaid. It does not appear whether the lump sum of \$3,500 has been paid by the charterer to the owners.

My conclusion therefore is that the libellant is entitled to recover

the amount of its damages, so far as any pending freight is applicable to pay such damages, as provided for by the statutes limiting the liability of shipowners, but that the respondent is not liable to any greater extent. I regret to be obliged to reach such a conclusion which I think unjust, but that, in my opinion, is not infrequently the result of the operation of the statutes limiting the liability of shipowners when the ship itself is a total loss.

A reference should be ordered, unless counsel can agree on the facts, to take testimony and report whether there is any freight pending to be surrendered, within the meaning of the statutes exempting shipowners from liability, and if so, how much, and whether the libellant is entitled to a judgment for the whole of said amount or for only nine-sixteenths of said amount, with authority in his discretion to take testimony, and report on any other question which may appear to be necessary to a proper determination of the amount to be recovered in the suit.

November 14, 1913.

459

Final Decree.

At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Post Office Building, in the City of New York, on the 29th Day of November, 1913.

Present: Hon. George C. Holt, District Judge.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners,
Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually, Respondents.

This cause coming on to be tried on the pleadings and proofs adduced by the respective parties, and having been argued and submitted, and due deliberation having been had, and the Court having found that the libel should be dismissed as to the respondent, Edwin S. Pendleton, and that the libellant is entitled to recover from the respondent, Fields S. Pendleton, nine-sixteenths of the amount of its damages, but that the said Fields S. Pendleton is entitled to limit his liability to his interest in the Schooner "Edith Olcott" and her freight pending for the voyage mentioned in the pleadings herein; Now, on motion of Henry W. Goodrich, Esq., Proctor for the respondents, it is

460 Ordered, adjudged and decreed, that the libel herein be dismissed separately as against the respondent, Edwin S. Pendleton;

And it appearing by stipulation filed herewith that the said schooner "Edith Olcott" was a total loss, and that there was no pending freight for the voyage in question, it is further

Ordered, adjudged and decreed, that the libel be separately dismissed as against the respondent, Fields S. Pendleton,

And the respondents having applied separately for the allowance of their costs and disbursements, it is

Ordered, adjudged and decreed that no costs be allowed to either respondent; and it is further

Ordered, that unless an appeal be taken as prescribed by the rules and practice of this court, the stipulation for costs filed by the respondents herein be cancelled and discharged of record.

GEO. C. HOLT, D. J.

A. G.

Notice of settlement of the foregoing decree is hereby waived.
Nov. 28, 1913.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

HENRY W. GOODRICH,
Proctor for Resp'ts.

461 *Notice of Appeal.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Trans-acting Business under the Firm Name of Pendleton Brothers, and
Fields S. Pendleton, Individually, Respondents.

SIRS: Please take notice, that Benner Line, the libellant herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein in the office of the Clerk of this Court on the 29th day of November, 1913, in so far as the said decree dismisses the libel herein as against the respondent, Fields S. Pendleton.

Dated, New York, December 2nd, 1913.

Yours, etc.,

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

64 Wall Street, New York City.

To: Henry W. Goodrich, Esq., Proctors for Respondents. Alexander Gilchrist, Esq., Clerk.

462 *Waiver of Bond.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, as Copartners,
and Against FIELDS S. PENDLETON, Individually, Respondents.

The filing of a bond for costs on appeal in the sum of Two Hundred and Fifty Dollars (\$250) in the above matter is hereby waived.
Dated, New York, December 4th, 1913.

HENRY W. GOODRICH,
Proctor for Respondents-Appellees.

463

Assignment of Errors.

United States District Court, Southern District of New York.

BENNER LINE, Libellant-Appellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Trans-
acting Business under the Firm Name of Pendleton Brothers, and
Fields S. Pendleton, Individually, Respondents-Appellees.

The libellant-appellant hereby assigns error in the decisions and final decree of the United States District Court for the Southern District of New York in the above entitled action as follows:

First. In that the said District Court found that libellant was entitled to recover from the respondent, Fields S. Pendleton, only nine-sixteenths of the amount of its damages.

Second. In that the said District Court found that the said Fields S. Pendleton was entitled to limit his liability to his interest in the schooner "Edith Olcott" and her freight pending for the voyage mentioned in the pleadings.

Third. In that, although the respondent, Fields, S. Pendleton, personally negotiated and signed the charter party upon which this suit was brought, the said District Court held that the said charter party was not the personal contract of the said respondent, Fields S. Pendleton.

Fourth. In that although the said respondent, Fields S.
464 Pendleton, had personally and expressly agreed that the schooner "Edith Olcott" should be tight, staunch, strong and in every way fitted for the voyage mentioned in the pleadings herein; and although the said District Court found that the vessel was not tight, staunch, strong and properly fitted as agreed, nevertheless the said District Court held that the said respondent was entitled to limit his liability for the resulting damage to nine-sixteenths thereof, and to his interest in the said schooner and her freight pending for the voyage.

Fifth. In that said District Court dismissed the libel herein as against the respondent, Fields S. Pendleton.

Sixth. In that the said District Court did not enter a decree against the respondent, Fields S. Pendleton, in favor of the libellant for its full damages as claimed in the libel herein.

Dated, New York, December 1st, 1913.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant-Appellant.

64 Wall Street, New York City.

465 *Stipulation as to Exhibits.*

United States Circuit Court of Appeals for the Second Circuit.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Trans-
acting Business under the Firm Name of Pendleton Brothers, and
Fields S. Pendleton, Individually, Respondents.

It is hereby Stipulated and Agreed, by and between the proctors
for the respective parties herein, that the exhibits in the foregoing
case not printed in this record, may be used upon the argument of
this appeal, subject to the approval of this Court.

Dated, New York, January 28th, 1914.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.
HENRY W. GOODRICH,
Proctor for Respondents.

466 *Stipulation.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Trans-
acting Business under the Firm Name of Pendleton Brothers, and
Fields S. Pendleton, Individually, Respondents.

It is hereby stipulated and agreed by and between the proctors for
the respective parties hereto, that the foregoing record on appeal
contains all the evidence and all the proceedings as agreed upon
and may be certified by the Clerk of this Court and filed in the office
of the Clerk of the United States Circuit Court of Appeals for the
Second District.

Dated, March 20th, 1914.

HENRY W. GOODRICH,
Proctor for Respondents-Appellees.
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant-Appellant.

467 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

BENNER LINE, Libellant,
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Trans-
acting Business under the Firm Name of Pendleton Brothers,
and Fields S. Pendleton, Individually, Respondents.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 28th day of March in the year of our Lord one thousand nine hundred and Fourteen and of the Independence of the said United States the one hundred and thirty-eight.

[SEAL.]

ALEX. GILCHRIST, JR., *Clerk.*

468 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1913.

No. 283.

Argued May 18, 1914; Decided August 10, 1914.

BENNER LINE, Libellant-Appellant,

vs.

FIELDS S. PENDLETON and EDWARD S. PENDLETON, Copartners, Etc.,
Respondents-Appellees.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Coxe and Rogers, Circuit Judges, and Hand, District Judge.

Harrington, Bigham & Englar, Proctors for Libellant-Appellant;
D. Roger Englar, Advocate.

Henry W. Goodrich, Proctor for Respondent-Appellee.

This cause comes here on appeal from a final decree of the United States District Court for the Southern District of New York finding that the libellant is entitled to recover from the respondent Fields S. Pendleton, nine-sixteenths of the amount of its damages, but that the said Fields S. Pendleton is entitled to limit his liability to his interest in the schooner "Edith Olcott" and her freight and dismissing the libel as to the said Pendleton, which decree was entered on November 29, 1913.

469 The libellant is a corporation organized under the laws of the State of New Jersey and engaged in business as a carrier between the Port of New York and ports in Porto Rico.

The respondents are copartners engaged in business as ship brokers in the City of New York, Borough of Manhattan, State of New York. They were the managing owners of the schooner "Edith Olcott," the respondent Fields S. Pendleton owning in his own right nine-sixteenths of the vessel.

On July 7, 1910, the respondents chartered the vessel to the libellant for a voyage from New York to San Juan, Porto Rico. On Au-

gust 6th the "King Edgar" seeing the Olcott's signals of distress came alongside and took the vessel in tow when in latitude 37.3 degrees N. longitude 65.3 degrees West under an agreement to tow her to New York for \$15,000. But on August 7th the tow rope parted and the vessel was abandoned, at 6 A. M. in a sinking condition, the water in her hold having then reached a depth of thirteen and one-half feet and gaining steadily despite all efforts to prevent it.

The charter party was signed in the name of Pendleton Brothers and the suit was brought against Pendleton Brothers and against Fields S. Pendleton individually. It having developed at the trial, however, that neither the firm of Pendleton Brothers nor the respondent Edwin S. Pendleton owned any share in the vessel or had any interest in the transaction except as agents, it was conceded by the libellant at the close of the trial, that recovery could be had only against the respondent Fields S. Pendleton, who was the managing owner of the vessel and who hereafter will be referred to as the respondent.

ROGERS, Circuit Judge:

This libel is filed by the libellant as bailee of a cargo of general merchandise laden on board the schooner "Edith Olcott" which was lost at sea with her entire cargo on August 7, 1910. The value of the cargo amounted to \$40,000 and to recover this sum the suit is brought. The theory of the suit is that the respondent failed to furnish a seaworthy vessel at the beginning of the voyage. The respondent denied the allegations as to the unseaworthiness of the schooner and alleged that due diligence was exercised to make the vessel in all respects seaworthy and properly manned, equipped
470 and supplied. And further answering the respondent stated that if it in any way appeared that the vessel was not seaworthy at the commencement of the voyage or thereafter that such unseaworthiness was without his privity or knowledge and under the laws of the United States relating to limitation of liability on the part of vessel owners, he is relieved of all liability growing out of the loss of said schooner; "and if any liability on the part of this respondent does exist, it is limited to his proportionate part of said schooner as hereinbefore stated."

It was urged in the argument that libellant has no capacity to sue as a bailee for the loss of the goods. The contention was that the ship owner was the bailee of the cargo and not the libellant. The libellant held itself out to the public as a common carrier; it advertised for and solicited cargoes; it provided a dock to which the cargo was delivered; it chartered the vessel by which the cargo was to be carried, and employed the stevedores who put the cargo on board the ship; it fixed the freight rates and received the freight upon the shipments; and it provided its own form of bill of lading, which was in its own name and not in the name of the ship or in the name of the respondent and it was signed at its office by the master or agents of the vessel. There is nothing out of the ordinary in that it was signed by the master of the vessel, that being the usual practice. No goods

could be put on board the vessel except by virtue of a prior contract of affreightment with the libelant. This shippers knew only the Benner Line and contracted with the Benner Line which took all the profits of the enterprise. The shippers or owners of the merchandise took no part in the selection of the ship by which the goods were carried. It is impossible to say under the circumstances of the case that the ship rather than the libelant was the carrier and that the libelant is without right to sue as bailee of the cargo. If the libelant was the carrier, and of that we have no doubt, then there can be no question but that the action can be maintained. In *The Beaconsfield*, 158 U. S. 303, 307 (1895) the Supreme Court, speaking through Mr. Justice Brown said: "It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried." And see *The New York*, 93 Fed. 495 (1899). In that case the charterer used the barge for the transportation of goods for third persons between New York and New London. The cargo was injured by water which reached it by leaking through the upper seams of the vessel. The Court held that the charterer as carrier was so far the representative of the owner of the cargo that he was entitled to sue in his own name for the injury done the cargo.

Of course no question can be raised as to the right of a bailee to maintain any proper action to recover for a breach of contract in connection with the bailed property during the existence of the bailment.

There can be no question but that it is the duty of the ship owner to provide a ship which is fit and competent for the cargo and particular service for which she is engaged. The carrier either expressly or impliedly warrants the seaworthiness of the vessel at the commencement of the voyage. *The Carib Prince*, 170 U. S. 655. And this warranty that the vessel is fit at the beginning of the voyage is an absolute undertaking, which is not dependent on the owner's knowledge or ignorance that the ship is in fit condition to undergo the perils of the sea. *The Caledonia*, 157 U. S. 124. The warranty covers latent defects not ordinarily susceptible of detection as well as those which are known or discoverable by inspection. In *The Edwin I. Morrison*, 153 U. S. 199, 210 (1894) the Supreme Court adopted the language used by Mr. Justice Gray in the Circuit Court in which he said: "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy. The warranty is absolute that the ship is, or shall be, in fact, seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." And in *The Caledonia*, 157 U. S. 124, 130 (1895) the above doctrine is reaffirmed and Mr. Chief Justice Fuller said: "The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible

of detection. If this were so, the obligation resting on the ship owner would be, not that the ship should be fit, but that he
472 had honestly done his best to make her so. We can not concur in this view. In our opinion the ship owner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

It may be conceded in the case at bar that the respondent thought that *The Edith Olcott* was in a seaworthy condition at the time she started on her voyage to Porto Rico. The respondent, before the vessel started on her voyage, instructed the most competent captain in his employ to put the boat in dry dock and have her put in seaworthy condition to go in the Gulf of Mexico to stay for eight or ten months. The man had been employed by the respondent's concern for more than 40 years and the matter was turned over to him because, as respondent testified, there was no man in the country in his opinion who was more competent. "He is the only master," he testified, "that never cost us a dollar; he is the only man I know of that has had that success." That this man was a thoroughly competent man seems to be admitted. But neither the good intentions of the respondent nor the competency of this captain can save the respondent from liability if notwithstanding what was done the vessel was not in reality in a seaworthy condition when this voyage was commenced.

To constitute seaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo.

The *Edith Olcott* was a four masted wooden schooner of some 985 tons burden. She was 192.4 feet in length; 42.4 feet in breadth; 18.4 feet in depth below the main deck. She was about twenty years old having been built in 1890. The vessel was considered in insurance circles as good a risk as the usual vessel of her age. One of the experts who examined her before she started on this voyage reported that she was in "the pink of condition." Witnesses who inspected her testified that they found her seams and butts in first
473 class order, as were her rigging, decks, waterways and chain plates and that she was "in first class condition," "one of the finest vessels" the witness had ever seen and "fit to go around Cape Horn in."

The superintendent of the Drydock Company testified as to repairs made on the vessel in July and December, 1909, and in January and July, 1910. It appears that she was on the dock in July, 1910, and an examination was made of her bottom and seams. The witness was asked whether at that time she was tight, staunch and strong and he answered, "I should say she was," but admitted he was testifying from a more or less general impression. The inspector of the American Bureau of Shipping whose business it was to inspect vessels for the purpose of underwriting testified that the vessel

was "first class," and that she was thoroughly examined for reclassification in 1905 and was given an A-1 rating for six years—a rating which would have expired in June, 1911, one year after the loss of the vessel occurred. He stated that The Edith Olcott was "Exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost," and that she was incapable of receiving any higher classification than was given her in his Bureau. The evidence given by other inspectors was of similar import.

Now we pass to inquire what happened. She left New York for Porto Rico on Sunday, July 31, 1910. All went well until Wednesday when it was discovered she had about four feet of water in the hold. The amount of water gradually increased until Saturday when it had increased to thirteen feet and she had to be abandoned with her cargo and became a total loss.

By way of explanation of the cause of the leak the suggestion has been made that the vessel must have struck some submerged object on the night between August 2 and 3. No suggestion to this effect was made until nearly three years after the disaster. The engineer of the Olcott testified that he felt some sort of a slight shock about twelve o'clock on Tuesday night, August 2nd. That he did not think anything had happened and that he turned in to bed. That he never mentioned it to anyone except that when the mate came around he said to him, "What struck her?" and got the reply, "Nothing as I know of." It could not have been much of a shock for neither the captain nor mate, nor anyone else on the vessel noticed it. No mention of any shock is found in the protest

drawn up in the respondent's office and verified by the officers
471 and crew of the "Edith Olcott," and the answer contains no allusion to it. When the testimony was taken a witness of wide experience at sea was asked whether in his opinion it was possible that a vessel could hit an obstruction with force enough to damage her, assuming that she is a seaworthy vessel and cause her to leak, without its being noticed by persons on board who were awake. He answered that it was not. This testimony seems to us most credible. It is true that one of the respondent's witnesses, also a man of experience and character, testified that he thought the vessel must have struck a submerged wreck or something of that kind. He stated he had been on a vessel which struck a concealed obstruction which caused the vessel to leak and that he had no knowledge at the time that the ship had struck it. But in that case the fact that the vessel had struck the obstruction was not discovered until the vessel had arrived at her destination and been discharged of her cargo. Is it quite credible that the vessel might strike an obstruction and cause a slight leak without attracting attention at the time. But it is difficult to believe that a staunch and seaworthy vessel could meet with an obstruction serious enough to send her to the bottom without its being noticed by those whose business it is to keep watch over all that happens. There is, too, another reason for thinking that the trouble was not occasioned by an obstruction striking the bottom of the ship. In this case the schooner started to leak and

when the weather got worse the leak got worse, and when the weather got better the leak also got better. A collision striking a vessel below the water line would not produce results of that kind. On the contrary a leak so produced would be continued or else grow worse all the time. The account the witnesses give of this leak is the story of a vessel whose seams have opened and not of one having a hole opened in her bottom. The Protest filed on August 10 stated that on August 3rd the leak was discovered and "After working pumps one hour sounded again and found leak increasing. Latter part wind and sea still increasing in force." And on August 4: "8 A. M. wind and sea the same. Vessel laboring and straining and shipping considerable water. Leak still beyond control of the pumps. Sounded pumps and found eight feet of water in hold.

475 Steam pumps kept going continually. Noon wind and sea moderating somewhat. Steam pumps holding water in control at eight feet for the remainder of this day." And on August 5: "Wind and sea more moderate. Running before the wind and sea. Sounding pumps every hour finding water still at eight feet. Steam pumps continually working. 8 P. M. heavy squall from South West causing sea to rise rapidly. Vessel laboring heavily and shipping immense quantities of water. Leak increasing on pumps." And on August 6th: "10 P. M. vessel plunging into head sea shipping large quantities of water and settling forward. Steam pumps going constantly. Sounded and found water gaining. Midnight wind and sea still increasing. Sounded and found ten feet of water in vessel. Vessel would not answer helm, was continually under water and settling. Engine room and cabin flooded." - And on August 7th, the weather was "serious" and the amount of water was "thirteen and one-half feet" and the vessel was abandoned.

While it may be possible that this vessel struck a submerged object without the knowledge of those on board and that such a collision occasioned a loss, we think the possibility of such an occurrence is too remote to be made the basis of a judicial finding.

The vessel had been on a voyage from Baltimore to Jacksonville, Florida, with a cargo of railroad iron which is considered one of the hardest if not the hardest cargo that can be put into a vessel. She brought back a cargo of yellow pine ties. The voyage on which she carried the railroad iron was the last preceding the one on which she was lost. It was not unlikely that that voyage seriously weakened her and strained her seams, so that the heavy weather she encountered caused the seams to open and the ship to leak. While the weather was heavy there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to stand the strain. The fact that the vessel sprang so bad a leak and that no satisfactory explanation of the fact has been made indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage.

This brings us to a consideration of the vessel's pumping equipment. The testimony shows that she was provided with more pumps than most vessels. There were two large steam pumps and two hand

pumps. One of the steam pumps—a six or seven inch wrecking pump—was in the engine room in the well deck forward, and was operated by a cog wheel on the shaft of the winch. The other

476 steam pump, known as the messenger pump, was situated on the main deck aft of the engine room and was operated by a messenger chain which ran from the shaft of the winch out through the side of the engine room. The “messenger” pump was a double pump and had a capacity about equal to that of the wrecking pump. There was a fifth pump but it was not designed for taking water out of the hold. It was a small circulating pump designed for running water through the condenser and for washing down decks and is not to be regarded as part of the vessel’s regular equipment for pumping water out of the ship. It is undisputed that within an hour after the wrecking pump was started some of the cogs were stripped from the wheel, rendering it thereafter impossible to make use of it. The port hand pump was tried but with a result so unsatisfactory that it was decided to try the starboard hand pump. But after using it an hour and a half the men were unable to move it. Orders were given to hoist it out and after this was done it was lashed down on the deck and never used again, the reason assigned for so doing being that it had been bent while being hauled out. Then the port hand pump was used again for something over an hour when it had to be abandoned and no effort was made again to use either of the hand pumps. There was testimony tending to show that when the starboard hand pump was hauled out the suction pipe was found to have been rusted through. While the “messenger” pump was used the testimony shows it did not work at anything like its full capacity. It was evidently in poor condition, one witness stating that when he observed it it was discharging “a mere dribble of water.” The statement of some of the witnesses was to the effect that had even one pump, either hand or steam, been in an efficient condition, the schooner could have made port without any assistance whatever. There was testimony to show that the pumps were in good order before the vessel sailed. But over against this testimony stands the fact that three of these pumps broke down one after the other when an attempt was made to use them for the very purpose for which they were provided and that the fourth pump did not respond effectually when it was put into operation. The court below thought the inference was irresistible that the pumps which failed were not fit to use when the ship began its voyage. That inference seems justified and if

477 justified the conclusion is unavoidable that the ship was not seaworthy in this respect also when she started on the voyage. One of the witnesses, a seaman on the “King Edgar” which took the “Olcott” in tow testified that he made an examination of the pumps and found them “in a rusty condition, the pipes were corroded and if you put your hand against them they were liable to fall away and break.” That refers to the hand pumps. The steam pumps were in a condition that they would not suck; one which was working was in a bad condition owing to the gipsy chain having no connecting links, and it was in a very poor state; it would not have lasted if we had tried to tow her back to New York.” He also said: “I saw one pump

working the others would not work at all owing to the pipes having holes in them. They would not suck." The pumps had been out of condition, for a good time, a very long time I should say; they were corroded with rust." Much of the testimony concerning the condition of the pumps is unworthy of credence as coming from persons characterized very properly by the court below as "obviously a venal and dishonest lot" who offered their testimony against the respondent after they had offered their testimony in his favor for money and been refused. But it may be said of the pumps, irrespective of all such testimony *res ipsa loquitur*, the thing speaks for itself. The pumps were not in condition to be used. Three of the pumps broke down, as soon as the emergency arose when they were needed and there is no satisfactory explanation forthcoming telling why they broke down. We are forced to the conclusion, therefore, that as respects both her hull and her pumps the vessel was not seaworthy when she began her voyage.

This being the case the question arises whether the respondent being liable upon the principles of the maritime law can claim the benefit of the Harter Act. The Congress of the United States has passed from time to time various statutes limiting in greater or less degree the absolute liability of carriers by water. The most important of all these statutes is the act of February 13, 1893, 27 U. S. St. at L. 445, c. 105 U. S. Comp. St. 1901 p. 2946, which is known as the Harter Act. That Act in §3 provides as follows:

478 "That if the owner of a vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

This Act has no application to the facts of this case. The Edith Olcott was not lost because of any fault in navigation or from dangers of the sea within the meaning of that expression in maritime law. There is no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew after the voyage began. The fault was not a "fault or error in navigation or management of the vessel."

The Harter Act in the section cited above does not relieve the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage, or affect his liability for the loss of the cargo arising from unseaworthiness. The trend of judicial decision has

been to construe the Harter Act strictly. The law on this subject has been correctly stated as follows: "The greatest amount of litigation under the Act has centered around the third section. This section does not release the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage or affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy." 36 Cyc. 282.

Congress has also passed acts limiting a shipowner's liability to the value of the vessel and the freight earned. The most important of these statutes was passed March 3, 1851 and which has
479 been amended from time to time. The most important of the amendments being those of June 26, 1884 and June 19, 1886. The Act of Congress provides for limiting the liability of the owner of the vessel for the loss of goods shipped so that it shall not exceed the amount or value of the interest of such owner in such vessel and her freight then pending. Revised Statutes, 2 ed. 1878, §4283; 23 U. S. St. at L. 57 c. 121 §18 (U. S. Comp. St. 1901 p. 2945); 24 U. S. St. at L. 80 c. 421 §4 (U. S. Comp. St. 1901 p. 2945).

The Act of March 1851 enacted that;

"That liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

And the Act of June 26, 1884 enacted that

"The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending; Provided that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship owners."

The two acts have been regarded as being in *pari materia* and therefore have been construed as parts of one entire scheme.

The respondent insists that if he is liable for the loss of the cargo on the Edith Olcott he is entitled to limit his liability under this legislation, the loss having been incurred without his privity
480 of knowledge." But the libelant claims that the respondent cannot have the benefit of the Act as it was not intended to apply to personal contracts.

This court decided in the Loyal, 204 Fed. 930 (1913) that a

ship owner is not entitled to a limitation of liability for a breach of his personal contract. We held in that case that where a light-
 erage company contracted to do all the lighterage for
 an importer for a fixed term, which contract carried by
 implication a warranty that the lighters furnished should be sea-
 worthy but because of the unseaworthiness of one salvage services
 were incurred to save the cargo, the company was not entitled to
 limit its liability for such expense. In announcing the principle
 we did in the above case we followed the decision made by the Sixth
 Circuit in *Great Lakes Towing Company v. Mill Transfer Com-
 pany*, 155 Fed. 11, 16 (1907). In that case the court said: "The
 purpose of Congress, was, as we think, to relieve the ship owner
 from the consequences of those extraordinary risks which were im-
 posed without limitation by the law of the admiralty as that law
 had been interpreted in this country. And by extraordinary risks
 we mean those risks arising from the conduct of, and contracts
 made by, those who are beyond the personal supervision and con-
 trol of the owner and yet have legal authority to bind him to
 answer for their conduct or contracts; or to express the thought in
 another way, that the liabilities intended by this legislation were
 those peculiar to him as a shipowner and had been imputed to him
 because of his relation to the ship and not those liabilities, whether
 for torts or from contracts, which spring from his own personal con-
 duct or stipulation. It seems to us altogether unlikely that Con-
 gress intended to qualify the power of an owner to make contracts
 in relation to his ship which by the universal law would be valid
 if made about anything else and would be enforced in the courts
 in common law actions. It would be an anomaly that a party com-
 petent to do business should be unable to make a valid contract
 about his own affairs or be given such an immunity as to make his
 stipulations of uncertain value."

The question therefore arises whether the contract of the respond-
 ent is a personal contract. The court below thought that it was
 not. The District Judge said: "The charter party signed by Pend-
 leton Bros. was a charter party of the particular schooner
 481 Edith Olcott. Pendleton Bros. in signing that charter party,
 acted as the agents of the owners. The agreement was the
 owners' agreement chartering the schooner, and was an agreement
 made in the conduct of the schooner. Under such circumstances,
 in my opinion, the charter party cannot be regarded as the mere
 personal contract of Pendleton Brothers. It was the ordinary case
 of a charter party binding the vessel."

The learned District Judge thought the case at bar distinguish-
 able from the case of *The Loyal* and from the *Great Lakes Tow-
 ing Company* case in that in those cases the contracts did not specify
 any particular vessel, by which in the one case the lightering was
 to be done and in the other by which the towing was to be done.
 We find no such distinction laid down in any of the authorities. It
 seems to us that the distinction which the courts have drawn relates

to the manner in which the contract is made, rather than to the character of the contract itself. The rule which has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or imputed to him by law; but he may not limit his liability upon contracts which he personally makes or upon obligations which he personally assumes. If the particular contract is made by the shipowner in person it is a matter of no consequence so far as the question now under consideration is concerned whether it relates to and binds a particular vessel or not.

By a "personal contract" we understand to be meant a contract made by the person or corporation to be bound as distinguished from one imputed to such person or corporation. In *Great Lakes Towing Company v. Mill Transportation Company* supra, the court said: "The contracts of the manager are the actual contracts of the owner and are not of the same character as the contracts of the master made on a voyage or in foreign ports and which are imputed to the owner from the necessities of commerce. The acts of the managing agent within the sphere of authority are as much the acts of the owner as if done by the owner himself. Only upon this theory could a corporation make what, for the purpose of making a distinction, is called a personal contract, that is to say, one which the owner himself or itself has made."

The argument has been advanced that the contract herein involved is in no way the personal contract of the respondent and that no accident of signature either to the charter party or the bill of lading can make it a personal contract. It is said that it is such a contract as is incident to the ownership of vessels. But this is a case where the managing owner of a vessel personally negotiated and signed the contract, charter party, which contained a provision that the vessel should be "tight, staunch, strong and in every way fitted" for the voyage. It purported to be made between the libelants and Pendleton Brothers, agents of the schooner "Edith Olcott" and was signed "Pendleton Brothers, Benner Line." As the respondent, the principal owner of the vessel, personally signed it as his own agent, he bound himself. The fact that it was the ordinary case of a charter party binding the ship does not prevent its being the personal contract of Pendleton Brothers.

The decree of the court below limiting the liability of the respondent Fields S. Pendleton to his interest in the schooner "Edith Olcott" and her freight pending for the voyage mentioned in the pleadings, and separately dismissing the libel as against the said Fields S. Pendleton must to that extent be reversed with costs. The amount due on the claim of the appellant will be ascertained and such further proceedings had as the rules and practice of the court require.

483 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court

Rooms in the Post Office Building in the City of New York, on the 20th day of August, one thousand nine hundred and fourteen.

Present: Hon. Alfred C. Coxe, Hon. Henry Wade Rogers, Circuit Judges, and Hon. Learned Hand, District Judge.

BENNER LINE, Libellant-Appellant,

vs.

FIELDS S. PENDLETON and EDWARD S. PENDLETON, Copartners, etc.,
Respondents-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court limiting the liability of the respondent Fields S. Pendleton to his interest in the Schooner "Edith Olcott" and her freight pending for the voyage mentioned in the pleadings, and separately dismissing the libel against the said Fields S. Pendleton be and it hereby is to that extent reversed with costs, with directions to the court below to ascertain the amount due on the claim of the appellant in accordance with the opinion of this court.

H. W. R.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

484 Endorsed: United States Circuit Court of Appeals, Second Circuit. Benner Line vs. F. S. Pendleton & Ano. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Aug. 27, 1914. William Parkin, Clerk.

485 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages numbered from 1 to 484 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Benner Line, Libellant-Appellant, against Fields S. Pendleton, & Ano, Respondents-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of May in the year of our Lord One Thousand Nine Hundred and Sixteen

and of the Independence of the said United States the One Hundred and Fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

486 United States Circuit Court of Appeals for the Second Circuit.

BENNER LINE, Libellant-Appellee,
against
FIELDS S. PENDLETON, Respondent-Appellant.

TRANSCRIPT OF RECORD.

Original.

United States Circuit Court of Appeals, Second Circuit. Filed
Nov. 29, 1895. William Parkin, Clerk.

487 United States District Court, Southern District of New York.

BENNER LINE, Libellant-Appellee,
against
FIELDS S. PENDLETON, Respondent-Appellant.

Statement.

1911.

Nov. 11. Libel filed.

Dec. 28. Answer of Edwin S. Pendleton filed.

Dec. 28. Answer and interrogatories on behalf of Fields S. Pendleton filed.

1913.

Oct. 9. Case called for trial.

Nov. 14. Opinion rendered in favor of the libellant and allowing respondent to limit liability and dismissing libel against Edwin S. Pendleton (210 F. R. 67).

Nov. 29. Final decree entered.

Dec. 3. Notice of appeal by libellant and assignments of error filed.

488

1914.

Aug. 10. Opinion rendered reversing the judgment of the District Court (217 F. R. 497).

Aug. 27. Mandate issued in accordance therewith remanding the case to the District Court for further proceedings.

Sept. 4. Interlocutory decree entered referring to Edward L. Owen, Esq., the ascertainment of damages.

1915.

May 29. Commissioner's report filed.

June 4. Exceptions filed by libellant.

- June 14. Exceptions filed by respondent.
- July 17. Opinion by Augustus N. Hand, J. overruling exceptions.
- July 22. Final decree entered in United States District Court, Southern District.
- July 31. Notice of Appeal by Respondent and assignments of error filed.

489 United States District Court, Southern District of New York.

BENNER LINE
against

FIELDS S. PENDLETON and EDWIN S. PENDLETON, Copartners, Transacting Business under the Firm Name of Pendleton Brothers, and Fields S. Pendleton, Individually.

Commissioner's Report.

To the Judges of the District Court of the United States within and for the Southern District of New York:

An interlocutory decree was heretofore and on the 4th day of September, 1914, duly entered in the above action, wherein and whereby, among other things, it was ordered that the libellant recover of and have judgment against Fields S. Pendleton for the damages sustained by the libellant as set forth in the libel, with interest, and that it be referred to the undersigned to ascertain and compute the damages due the libellant and to report to this Court with all convenient speed.

I, Edward L. Owen, the Commissioner to whom the matter was referred, do report:

I have been attended by the proctors for the respective parties, and have taken and examined the evidence offered by each of the parties and the exhibits also offered, which said testimony is returned with my report,—the exhibits, by consent of counsel, having been delivered to counsel for respondent. *

This action was brought by the libellant as bailee of a cargo of general merchandise, laden on board the schooner Edith Olcott, lost at sea with her entire cargo, on the 7th of August, 1910. The action was properly brought in the name of the libellant, as decided by the Appellate Court, but the same is brought by the libellant as bailee for the benefit of the shippers of the cargo or the underwriters thereon.

Among other defenses, the respondent Fields S. Pendleton sought to relieve himself from all liability under the laws of the United States relating to the limitation of liability on the part of vessel owners; he further claimed that if there was any liability on his part, such liability was limited to his proportionate part of the schooner.

The District Court held the libellant was entitled to recover the amount of its damages so far as the pending freight was applicable to pay such damage, as provided for by the statutes limiting the liability of shipowners, but that the respondent was not liable to any

greater extent, and a decree was duly entered in accordance therewith.

Thereupon, the libellant appealed from said decree of the District Court to the United States Court of Appeals, and that Court, after argument, among other things, reversed the decree of the District Court limiting the liability of the respondent Fields S. Pendleton to his interest in the schooner, Edith Olcott, and her freight pending, and directed the amount due on the appellants' (libellant's) 491 claim to be ascertained, and such further proceedings had as the rules and practice of the Court require.

The case was, thereupon, returned to the District Court, and the interlocutory decree heretofore referred to was duly entered.

The foregoing statement of the case is necessarily made because respondent, during the hearing on the reference, insisted that under the 12th clause of the bill of lading the carrier was entitled to the full benefit of any insurance that might have been effected upon or on account of the goods, and as there was such insurance there is no liability as against the carrier. This contention was disposed of adversely to respondent Fields S. Pendleton by the Circuit Court of Appeals, the decree having been made, as stated, finding said respondent liable for the damages sustained by the libellant.

It was also disposed of adversely to the said respondent by the interlocutory decree of this Court.

The action of the Circuit Court of Appeals and the decree of this Court place upon me no other duty than that of finding the damages. It is not for me to consider any questions raised by said respondent in opposition to the actions of the Court as here stated.

For these reasons, I decline to consider clause 12 of the bill of lading, except to find it has no bearing on the questions before me; nor does it in any manner settle, determine or dispose of the question of damages.

Several questions have been raised by the parties. The same will be disposed of before taking up and considering the damages.

The respondent claims the bills of lading were not properly 492 signed. They were produced on the trial, offered in evidence and admitted, and respondent's counsel stated (p. 95), "every one of which is signed by Pendleton Brothers," and (p. 96) "all of which are signed by Pendleton Brothers." The respondent Fields S. Pendleton was a member of this firm; it seems to me the act of the firm, if it has any bearing in view of the decision of the Circuit Court of Appeals, was the act of Fields S. Pendleton, even if he did not sign the bills of lading. That firm, as I understand the case, was the agent of the vessel. But the finding of the Circuit Court of Appeals disposes of the question; that Court held the bills of lading were signed by the master or agents of the vessel. They were therefore accepted and are binding upon the parties.

In every case, the bill of lading recites the receipt of the goods by the Edith Olcott. That contract of transportation was one between the shipper and vessel; in my judgment, therefore, every condition therein contained was one which related to the shipper and vessel and could be invoked by either party as against the other. As a mat-

ter of fact, the vessel was the carrier as between it and the shipper; if, therefore, there is any benefit to be derived from any condition in the bill of lading, the respondent, as owner of the vessel, is entitled to such benefit.

In the bill of lading each condition stands by itself and ought not to be construed in connection with any other condition, unless it was evident such was the intention of the parties to the contract. No such intention exists in this case, nor do I think such intention can be construed from any interpretation which may be given the instrument.

493 The appellate court held the libellant acted as bailee for the parties in interest; therefore, its duty ended upon presenting the shipper's claims, collecting the amount of damages allowed, and distributing to those entitled to the same, which, in my judgment, was a matter of interest to the libellant, the shipper, or underwriters. The underwriters having paid the loss became subrogated to the rights of the shippers; they are, therefore, the real parties in interest to the extent of any payment made by them, and if, after such payment, there still remained in the libellant's hands a balance on account of damages, that balance would belong to the shipper. In my opinion, it makes no difference what the settlement was between shipper and underwriter; that was a purely personal arrangement, and could in no manner relieve the respondent Fields S. Pendleton from paying the full damages.

The respondent Fields S. Pendleton insists that clause 4 of the bill of lading must be applied in determining the damages. That clause provides: "The carrier shall not be liable for and the shipper shall not demand any greater sum than one hundred dollars for loss or damages to or delay in delivery of any one package;" that is to say, each package is represented by the shipper as being of no greater value than the sum of one hundred dollars unless a greater value is stated and a bill of lading given therefor stating such greater value; and respondent insists he is entitled to limit his liability to the extent therein provided, if it should appear such condition was not complied with.

To this contention, libellant insists the question as to whether respondent is entitled to limit the liability to the extent provided in the bill of lading, has not been referred. The answer to this is, that every fact which may in any manner enter into the determination of the question of damages must at all times be considered; the interlocutory decree is, therefore, drawn in such manner as to permit the Commissioner to receive and examine everything material to and bearing on the question of damages.

494 I think this clause does enure to the benefit of the vessel. I cannot accept the libellant's contention that the decision of the Circuit Court of Appeals holds this clause does not enure to the benefit of the respondent or the vessel, but, as it is provided to be for the benefit of the carrier, it must therefore have been only for the benefit of the libellant. This cannot be so, for the reason that the bill of lading is the contract of carriage made between the vessel and the shipper; the libellant was not a party to it; and, so far as it

personally was concerned, it was not material, but, acting as it was in the capacity of bailee for the shipper or underwriter, as the case might be, it became necessary to resort to it to sustain the claim, and having done so it must accept it as the contract of transportation made by the real parties in interest,—shipper and vessel.

Moreover, the shippers were not bound by the charter party; they were not parties to it, nor was the same referred to in the bills of lading, whereby the charter party could be considered the controlling instrument. I cannot find that the appellate court held the charter party was the controlling contract; that court only held the charter was the contract existing between the libellant and respondent, establishing such a relationship between the parties as gave the libellant the right to maintain this action as bailee on behalf of one who has entered into a separate contract of transportation.

Again, the bills of lading were the only contracts entered
495 into between the shipper and vessel, and were necessary to establish the fact of shipment of the cargo; so the libellant, on the reference, offered the same, but such offer was made qualifiedly. I do not think a qualified offer in evidence can be allowed. Having referred to them, and depending upon them for one purpose, the entire instrument becomes evidence. In the case of a charter party, it has been held in *Compania Bilbiana vs. Spanish American Light & Power Co.* (146 U. S. 483-493):—

“If the libellant seeks to enforce any part of the charter party, it must rely on the instrument as a whole, and it cannot affirm the charter party for one purpose and repudiate it for another.”

I see no reason why this rule does not equally apply in the present case.

Here, the libellant seeks to affirm the bill of lading so far as it relates to the shipment of the cargo, because it was necessary to do so, but repudiates that part of the contract which relates to the terms and conditions upon which the cargo was to be transported. I cannot accept the same as offered, but shall consider each and every part of the instrument which, in any manner, will aid in determining the amount of damages.

The bills of lading were introduced in evidence in the District Court, and were received without any qualification, and, on their face, show the contract of transportation was made between the Edith Olcott and the shipper. As then it was the vessel's contract, equally so must it be considered the contract of the vessel and owner, Fields S. Pendleton.

Respondent insisted, on the reference, that this action cannot be maintained by the libellant as bailee for the benefit of the shipper and underwriter. It is only necessary to state that this
496 right was fully established by the appellate court.

The Lehigh Portland Cement Company shipped a number of barrels of cement on the Edith Olcott; the same were insured in the Mannheim Insurance Company and in the British and Foreign Insurance Company, each in the sum of \$3,000. The evidence shows the Mannheim Company paid the

amount of its insurance, and while it is quite clear that the British and Foreign Insurance Company must have paid the amount of its insurance, still there is no evidence which sustains the fact of such payment. For this reason, respondent contends the loss is limited to the sum of \$3,000. As I have heretofore held, it makes no difference, in my opinion, what amount the underwriters paid in settlement of the insurance, the carrier or wrong-doer is bound to make restitution in the full amount of damage; and while there is no affirmative proof of payment made by the British and Foreign Insurance Company, still I shall find the full amount of damages in respect of this claim, because in my judgment it was sufficient to prove the value of the shipment, and this libellant did.

As to the shipment by the Gregg Company, the respondent claims the amount in this case cannot be allowed because, by doing so, the shipper would receive two profits on the same order. I do not think so. The shipment was lost; it must be paid for. Whether or not the shipment was duplicated is a matter of no importance.

Turning now to the question of damages, there seems to be no difference between the parties, that the rule of damages is the market value of shipment at Porto Rico, where proven; otherwise, the market value at New York, the port of shipment, together with freight and insurance, and such other charges properly incurred and paid to transport and land the articles shipped.

497 I therefore find and report the damages to the following shippers:

The value of the shipment by the Alpha Portland Cement Company, at the port of destination, Porto Rico, the sum of.....	\$3,700.00
The value of the shipment by the Lehigh Portland Cement Company, at Porto Rico, the sum of.....	5,550.00
The value of the shipment by the Gregg Company, at the port of shipment, New York, the sum of.....	12,541.63
The value of three shipments by the North American Trading Company, at the port of destination, Porto Rico, the sums of.....	\$748.69
	255.71
	878.51
	<hr/> 1,882.91
The value of the shipment by Heywood-Wakefield Company, at Porto Rico, the sum of.....	634.83
The value of the shipment by Fiske Brothers, at Porto Rico, the sum of.....	1,040.70
The value of the shipment by B. Souto & Company, at Porto Rico, the sum of.....	155.94
The value of the shipment by H. W. St. John & Co., at Porto Rico, the sum of.....	179.32
The value of the shipment by Melchior, Armstrong & Dessau, at Porto Rico, the sum of.....	2,468.80

The value of two shipments by S. Maduro
& Co., at Porto Rico, the sums of..... \$201.43
755.00

956.43

The value of three shipments by L. Oettinger,
at Porto Rico, the sums of..... \$636.66
744.30
20.02

1,400.98

498 As to the shipment made by Anderton, I find,
by reason of a failure to comply with the
conditions of the bill of lading, the recovery is limited
to \$100 for the boiler, and \$345.32 for the fire
bricks. There should be an allowance for freight
and insurance on the fire bricks, but there is no evi-
dence before me which enables me to find that
amount.

The damages on this shipment I report at.....
As to the shipment by the Orenstein-Arthur Koppel
Co., there were seventeen packages in the shipment.
The condition of clause 4 of the bill of lading not
having been complied with, the liability of the re-
spondent is limited to the sum of \$100 for each pack-
age, or \$1,700 for the seventeen.

445.32

The damages on this shipment I report at.....
On all of the amounts herein reported as damages in-
terest is allowed from August 10, 1910.

1,700.00

Making the total amount of damages the sum of Thirty-
two thousand six hundred and forty-seven and
86/100 (\$32,647.86) dollars, with interest as afore-
said.

Recapitulation.

Alpha Portland Cement Company, at Porto Rico, with interest from August 10, 1910.....	\$3,700.00
Lehigh Portland Cement Company, at Porto Rico, with interest from August 10, 1910.....	5,550.00
Gregg Company, at New York, with interest from Au- gust 10, 1910	12,541.63
North American Trading Company, at Porto Rico, with interest from August 10, 1910.....	1,882.91
499 Heywood-Wakefield Company, at Porto Rico, with interest from August 10, 1910.....	634.83
Fiske Brothers, at Porto Rico, with interest from August 10, 1910.....	1,040.70
B. Souto & Company, at Porto Rico, with interest from August 10, 1910.....	155.94
H. W. St. John & Co. at Porto Rico, with interest	

from August 10, 1910.....	170.32
Melchior, Armstrong & Dessau, at Porto Rico, with interest from August 10, 1910.....	2,468.80
S. Maduro & Co., at Porto Rico, with interest from August 10, 1910.....	956.43
L. Oettinger, at Porto Rico, with interest from August 10, 1910	1,400.98
George P. Anderton, with interest from August 10, 1910	445.32
Orenstein-Arthur Koppel Co., with interest from August 10, 1910	1,700.00
	<hr/>
	\$32,647.86

All of which is respectfully submitted.

Dated, New York, May 29, 1915.

EDWARD L. OWEN, Esq.,
Commissioner.

500 *Respondent's Exceptions to Commissioner's Report.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant,
 against

FIELDS S. PENDLETON and Another, Respondents.

Fields S. Pendleton, Respondent herein, hereby excepts to the Report of Edward L. Owen, Commissioner herein, filed May 29, 1915, as follows:

First. In that the Commissioner adopted as the rule of the measure of damages the market value of the goods at the port of destination in Porto Rico. This applies to the shipment of Alpha Portland Cement Company, Lehigh Portland Cement Company, North American Trading Company, Heywood-Wakefield Company, Fiske Brothers, B. Souto & Company, H. W. St. John & Company, Melchior, Armstrong & Dessau, S. Maduro, L. Oettinger and Orenstein-Arthur Koppel Company.

Second. In that the Commissioner failed to use as a measure of damages the invoice value of the goods at the port of New York plus insurance, freight (if prepaid) and interest.

Third. In that the Commissioner failed to adopt the rule of compensation to the insurers for the amounts paid by them
 501 respectively to the shippers, and found that the settlement between the shipper and the underwriter was "a purely personal arrangement and could in no manner relieve the respondent Fields S. Pendleton from paying the full damages."

Fourth. In that the Commissioner found the loss on the Lehigh Portland Cement Company shipment in the sum of \$5,550 in-

cluding in said loss an amount alleged but not proved to have been paid by the British and Foreign Insurance Company.

Fifth. In that the Commissioner found the loss in the Gregg Company Limited shipment to be the sum of \$12,541.63 adopting, as his measure the invoice price of the shipment, rather than the cost of the Gregg Company of the manufacture and delivery of the goods without profit.

Sixth. In that the Commissioner failed to find that this respondent is entitled to the benefit of the Twelfth clause in the bill of lading reading as follows:

"Twelfth. Also, It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by the said goods or any part thereof, for which the carrier shall be liable to the shipper or assignee, the carrier shall have the full benefit of any insurance that may have been effected upon or on account of the said goods."

Seventh. In that the Commissioner found that the libellant was entitled to any damages whatsoever in view of the proof before him that the contracts under which libellant was suing in its representative capacity, namely, the bills of lading issued to the respective shippers, were not signed by this respondent.

Eighth. In that the Commissioner found that the Captain's copies of the bills of lading which were introduced into evidence at the trial of the action, were the contracts between the shippers and the ship, and are binding upon the parties, and failed to distinguish between copies and originals of the bills of lading.

Ninth. In that the Commissioner failed to find that the carrier herein was the ship Edith Olcott and her owners.

Dated, June 4, 1915.

HENRY W. GOODRICH,

Proctor for Respondent.

503 United States District Court, Southern District of New York.

BENNER LINE, Libellant,

vs.

FIELDS S. PENDLETON and Ano., Respondents.

Opinion on Exceptions to Commissioner's Report.

Harrington, Bigham & Englar, Proctors for Libellant (D. Roger Englar, Advocate).

Henry W. Goodrich, Advocate for Respondent.

AUGUSTUS N. HAND, *District Judge:*

The Circuit Court of Appeals has held in the above case (reported in 217 Fed., 497) that the respondent is liable to the libellant for damages and that the basis of the liability is the charter party constituting the personal contract of the respondent whereby the vessel Edith Olcott was chartered by the owners of the Benner Line. The Circuit Court of Appeals further held that the Benner Line as bailee

was entitled to recover damages for the shippers. Edward L. Owen was appointed Special Commissioner to assess damages. I have read his report and think that it should be confirmed.

The libellant excepts to the report upon the ground that in assessing the damages the Commissioner enforced a clause in the bill of Lading which provided that the carrier should not be liable for any greater sum than \$100 in the delivery of any
504 one package unless a greater value is stated. The libellant insists that this clause was not pleaded or proved at the trial in the District Court, and, therefore, cannot be considered here. The question, however, is one of damages and anything which bears upon the amount of damages, whether pleaded or not, would seem to have been properly received by the Commissioner. The clause of the Bill of Lading bound the shipper, and I, therefore, think the Commissioner reached a correct conclusion in applying it to limit the damages, and that the exceptions of the libellant should be overruled.

The respondent's exceptions should likewise be overruled. His first exception relates to the measure of damages; which, wherever practicable, were allowed upon the basis of the value of the cargo at the port of destination. This is theoretically correct and was held by Judge Hazel to be the proper doctrine in *Admiralty in The Oceanica*, 156 Fed., 306. The same rule was adopted in this Circuit in the case of *The Oneida*, 128 Fed., 687.

The rule of value at the place of shipment, together with carrying expenses in cases where the value at the port of destination was not proved was applied by the Commissioner.

The respondent likewise excepts to the conclusions of the Commissioner that the recovery should be limited to the amount of the insurance recovered. I cannot understand the basis of such a contention as this. The right of subrogation would, of course, only extend to the amount paid, but why the recovery should be limited to the amount of insurance if that is the contention, as I understand it to be, I cannot imagine. The right of subrogation cannot benefit the person primarily liable, but only the Insurance Company who is regarded in these cases as in a position resembling a surety.

505 The further contention is made by the advocate for the respondent that the Twelfth Clause of the Bills of Lading providing that the carriers shall have the full benefit of any insurance should inure to the benefit of the respondent. That this provision cannot be invoked except where there is no right of subrogation, that is, where there is no right of recourse by the Insurance Company, was held by the Supreme Court in the case of *Inman vs. South Carolina Ry. Co.*, 129 U. S., 128. Each policy here, as in the case of *Inman vs. South Carolina Ry. Co.*, provided that it should be avoided in case the benefit of it be extended to any carrier or the right of subrogation otherwise defeated.

A further exception by the respondent is based upon his proof that the Bills of Lading were not signed by Fields S. Pendleton, but by Pendleton Brothers, a firm of which he was a member, as agents. I cannot see, however, that this fact makes any difference. The Cir-

cuit Court of Appeals has settled the law of the case as to the right of the libellant to recover against the respondent Fields S. Pendleton, and the question cannot be here reargued. Whether the Bills of Lading were contracts between the shippers and the libellant as carrier, or, as is usually the case, between the shippers and the owners, the libellant under that decision, has a right to recover against the respondent, the damages suffered by the shippers, and these have been, I think, correctly ascertained.

The exceptions are overruled and the report of the Commissioner confirmed. I will fix the fees of the Commissioner at \$750.

A. N. H., D. J.

509 At a Stated Term of the United States District Court for the Southern District of New York, Held in the Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 22nd Day of July, 1915.

Present: Hon. Learned Hand, District Judge.

Final Decree.

BENNER LINE, Libellant,
against
FIELDS S. PENDLETON, Respondent.

The libellant in the above entitled action having heretofore appealed to the United States Circuit Court of Appeals for the Second Circuit from the decree of this Court entered herein on the 29th day of November, 1913, limiting the liability of the respondent, Fields S. Pendleton, to his interest in the schooner Edith Olcott and her freight pending for the voyage mentioned in the pleadings, and separately dismissing the libel as against the said Fields S. Pendleton; and the said Circuit Court of Appeals having heard the said appeal and having handed down its mandate directing that the said decree limiting the liability of the respondent, Fields S. Pendleton, to his interest in the schooner Edith Olcott and her freight pending for the voyage mentioned in the pleadings, and separately dismissing the libel against Fields S. Pendleton, be and it is
507 herely reversed with costs, with directions to this Court to ascertain the amount due on the claim of the libellant in accordance with the opinion of the said Circuit Court of Appeals, as appears from the mandate of the said Circuit Court of Appeals filed with this Court; and in accordance with the said mandate an interlocutory decree having been made and entered herein on the 4th day of September, 1914, whereby it was ordered, adjudged and decreed that this cause be referred to Edward L. Owen, Esq., as Commissioner, to ascertain and report the amount of libellant's damages; and the said Commissioner having reported that the damages sustained by the libellant amount to the sum of \$32,647.86, with interest thereon from the 10th day of August, 1910, and both libellant and respondent having duly filed exceptions to the said report, and the said ex-

ceptions having duly come on to be heard, and due deliberation having been had thereon, and this Court having heretofore handed down an opinion directing that all of said Exceptions be overruled; and a judgment for the costs in the Circuit Court of Appeals having been awarded in the sum of \$578.48, and the costs of the libellant in this Court having been taxed in the sum of \$1,518.26, it is

Now, on motion of Harrington, Bigham & Englar, proctors for the libellant,

Ordered, adjudged and decreed that the report of the said Commissioner be, and the same is hereby in all respects approved and confirmed; and it is further

Ordered, adjudged and decreed that the libellant, Benner Line, recover of the respondent, Fields S. Pendleton, and have judgment for the sum of \$32,647.86, with interest from the 10th day of August, 1910, computed at the sum of \$9,696.41, and the further sum of \$578.48, its costs in the Circuit Court of Appeals, and the sum of \$1,518.26, its costs in this Court, making in all the sum of \$44,441.01, with interest thereon until paid, and that the libellant have judgment and execution therefor; and it is further

Ordered, that unless an appeal be taken from this decree within the time and in the manner provided by law and the rules and practice of this Court, execution issue against the respondent, his goods, chattels, lands and effects to enforce satisfaction of this decree, and the respondent's stipulators for costs show cause within four (4) days after the service of a copy of this decree with notice of entry on the respondent's proctor, or the first day of jurisdiction thereafter, why the engagements of their stipulations should not be performed, or why execution should not issue against them, their goods, chattels and lands in accordance with the terms of their said stipulations to enforce satisfaction thereof.

LEARNED HAND, *U. S. D. J.*

509 *Notice of Appeal.*

United States District Court, Southern District of New York.

BENNER LINE, Libellant-Appellee,
against

FIELDS S. PENDLETON, Respondent-Appellant.

GENTLEMEN: Please take notice that the respondent Fields S. Pendleton above named hereby appeals from the final decree made and entered herein on the 22nd day of July, 1915, to the next United States Circuit Court of Appeals for the Second Circuit to be held in and for said Circuit at the City of New York in the Southern District of New York.

Dated, New York, July 31, 1915.

HENRY W. GOODRICH,
Proctor for Respondent-Appellant.

49 Wall Street, New York City.

To Messrs. Harrington, Bigham & Englar, Proctors for Libellant-Appellee, and Alexander Gilchrist, Esq., Clerk.

Assignment of Errors.

United States District Court, Southern District of New York.

BENNER LINE, Libellant-Appellee,
against

FIELDS S. PENDLETON, Respondent-Appellant.

The respondent-appellant hereby assigns errors in the rulings and proceedings of the District Court herein as follows:

First. In that the District Court did not dismiss the libel because of the undisputed proof that all of the bills of lading covering the shipments, were signed by some other person or persons than the respondent Fields S. Pendleton.

Second. In that said District Court found that the contract under which the goods on board the schooner were carried, and under which the rights of the libellant arose, was the charter party, and did not find that said contract was the bills of lading.

Third. In that the District Court failed to dismiss the libel upon the ground that the Twelfth Clause in the bill of lading enures to the benefit of the respondent, Fields S. Pendleton.

Fourth. In that the District Court failed to sustain the
511 exceptions of the respondent to the report of E. L. Owen, Commissioner on file herein, but overruled the same.

Fifth. In that the District Court did not make a decree dismissing the libel with costs of the District Court.

Dated, July 31, 1915.

HENRY W. GOODRICH,
Proctor for Respondent-Appellant.

49 Wall Street, New York City.

Stipulation A.

United States Circuit Court of Appeals for the Second Circuit.

BENNER LINE, Libellant-Appellee,
against

FIELDS S. PENDLETON, Respondent-Appellant.

Stipulation.

It is hereby stipulated in lieu of printing in full the testimony taken on the reference before Edward L. Owen, Esq., Commissioner.

First. It was proved upon the reference:

(a) That all of the goods, for the loss of which this suit
512 is instituted, were covered by insurance and that Exhibit A, hereto annexed is typical of the policies covering the shipments; that none of the owners of said goods requested the institution of this suit; but that the institution of this suit was requested by the underwriters on the cargo.

(b) That the Bills of Lading issued to shippers, and offered in evidence by the libellant as a part of its proof, were signed either by John W. de Bruycker or Frank A. Huebner, clerks of Benner Line or N. A. Benner & Company, Incorporated, or Edwin S. Pendleton, a member of the firm of Pendleton Brothers, of which Fields S. Pendleton, the respondent here was the other member, and that none of said bills was signed by Fields S. Pendleton personally.

(c) That no goods owned by libellant Benner Line were on board but there were goods of N. A. Benner & Co., Incorporated, an associated company of libellant.

(d) That all of the evidence admitted to prove the facts stated in the above sub-division (a) was admitted over the objection of the libellant—such objection being taken on the ground that the evidence in question was incompetent, irrelevant and immaterial, and had no bearing upon any issue then pending before the Commissioner. In view of this objection, it was stipulated between counsel, with the approval of the Commissioner, that if the evidence adduced by respondent with respect to insurance should thereafter be deemed material and relevant, the libellant should be deemed to have reserved the privilege of submitting further evidence on this issue.

It is further stipulated:

Second. Respondent-Appellant stipulates that the assignment of error numbered four be abandoned by him upon the argument of the appeal herein, and that only the questions raised by the First, Second, Third and Fifth assignments of error be argued in this court.

Third. It is further stipulated that by entering into this stipulation libellant shall not be deemed to have waived any obligation heretofore taken or to have admitted the right of the respondent to appeal on any of the grounds stated in his assignments of error.

Dated New York, November 11th, 1915.

HARRINGTON, BIGHAM & ENGLAR,

Proctors for Libellant-Appellee.

HENRY W. GOODRICH,

Proctor for Respondent-Appellant.

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EXHIBIT A.

[Printed on left margin:] Warranted by the assured that the loading of vessels with Grain, Petroleum, and heavy cargoes, shall be made in accordance with the rules of the National Board of Marine Underwriters on such cargoes; and that a certificate of an Inspector appointed by the Board of Underwriters, or of a Surveyor appointed by the assurers, shall be obtained before the sailing of such vessels.

(Cargo.)
f.

No. —

Saint Paul Fire and Marine Insurance Company of St. Paul, Minn.

William H. McGee, General Agent Marine Department, New York.

— On Account of —. In case of loss, to be paid in funds current in the United States to —, Do — make Insurance and cause — to be insured, lost or not lost,

Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel, at — as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at — as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any port or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this Insurance. The said goods and merchandises, hereby insured, are valued (premiums included) at—.

Touching the adventures and perils which the said Saint Paul Fire and Marine Insurance Company is contented to bear and takes upon itself in this voyage, they are of the seas, fires, pirates, rovers, assailing thieves, jettisons, criminal barratry of the master and mariners (unless the assured on cargo be owner of or interested in vessel in whole or in part), and all other like perils and disasters, that have or shall come to the said goods and merchandises, or
515 any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the assured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; and to the charges whereof the said Insurance Company will contribute in proportion as the sum hereby insured is to the whole sum at risk.

The consideration for this insurance is hereby fixed at the rate of —.

And in case of loss, such loss to be paid in thirty days after proof of loss and proof of interest in the said goods or merchandise is exhibited to this Company (the amount of the note or notes given for premiums, if unpaid, and all indebtedness of the assured being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. exclusive of charges and expenses incurred for the purpose of ascertaining and proving the loss. Provided always, and it is hereby further agreed, That if the said assured shall have made any other insurance upon the premises aforesaid, prior in day of date to this policy, then the said Saint Paul Fire and Marine Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby insured; and

the said Saint Paul Fire and Marine Insurance Company shall return the premium upon so much of the sum by them insured as they shall be, by such prior insurance, exonerated from. And in case of any insurance upon the said premises subsequent in
 515a day of date to this policy, the said Saint Paul Fire and Marine Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said Insurance Company shall be answerable for no more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance.

This insurance warranted to be in all cases null and void as concerns loss or damage from fire on land to the extent of any insurance with any Fire Insurance Companies directly or indirectly covering upon the same property, whether prior or subsequent thereto in date. In the event of there being any specific or floating fire insurance which would, except for this policy, attach upon goods insured hereunder, then and in such cases all such fire risk is excluded from and is not covered by this policy. It is also understood and agreed, that in case any agreement be made or accepted by the Assured with any carrier by which it is stipulated that such or any carrier shall have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the insurers shall be discharged of any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for

(only) what cannot be collected from carrier and/or bailees
 515b and/or fire insurers of property lost or damaged, but also shall be chargeable with the direct pecuniary consequence to the assured temporarily arising from delay in collection from said carrier and/or bailees and/or fire insurers, and the advancing for this purpose only of funds to the assured for his protection pending such delay shall in no case be considered as affecting the question of the final liability of this insurance, and as soon as collection is made from the carrier and/or bailees and/or fire insurers the title of the assured to hold the sums so advanced by the insurer shall discontinue, and a portion thereof equal to the sum collected from the carrier and/or bailees and/or fire insurers, shall be repaid to the insurer, but in case of final failure to collect from carrier and/or bailees and/or fire insurers a portion of the sums advanced by the insurers, equal to the sum short collected from the carrier and/or bailees and/or fire insurers, may be retained and applied in settlement of the actual liability of this insurance thereby established (provided always, the loss shall constitute in other respects a claim under this insurance). In the event of loss or damage, this policy shall be null and void to the extent of any payment made by any carrier or bailee, liable or

not, or any payment made by any party in purchase of a claim hereunder, any assignment whatever given by the assured to the contrary notwithstanding.

Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, and the consequences thereof, or of any attempt thereat and also from all consequences of riots, insurrections, hostilities or warlike operations, whether before or after declaration of war; and whether lawful or unlawful; and whether by the act of any beligerent nations, or by governments of seceding or revolting States, or by unauthorized or lawless persons therein, or otherwise; and whether occurring in a port of distress or otherwise. Also warranted not to abandon in case of blockade, and free from any expense in consequence thereof, but in the event of blockade to be at liberty to proceed to an open port and there end the voyage. It is also agreed that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war, or the violation of any port regulation.

Proofs of loss and all bills of expenses must be approved by the agent of the Company, if there be one at or near the place where the loss occurs or the expenses are incurred, or if there be none in the vicinity, by the correspondent of the National Board of Marine Underwriters; and such agent or correspondent must be represented on all surveys.

No suit or action against this Company for the recovery of any claim by virtue of this policy shall be sustained in any court of Law or Equity unless commenced within one year from the time loss occurred.

Memorandum. Cement, fish (dried or pickled), goods used for dunnage, green fruit, hay, hops, ice, lime, matches, personal effects, pictures, plaster, salt in bulk, roots, vegetables, and all other articles perishable in their own nature, are warranted by the assured free of particular average; bricks, coal, fire arms and cartridges, fire crackers, fireworks, furniture (and all house furnishing articles), horns, India rubber, iron (manufactured or otherwise), lumber, minerals, marble, wood goods, slate, steel, steel rails, stone and wire of all kinds, are warranted free of claim for damage, but liable for total loss of a part (entire package), if amounting to five per cent.; bags, bagging, beans, bones, boneash, books, burlaps, chick pea, canned goods, carriages, cigars, clocks, grain of all kinds, Indian meal, indigo, leaf tobacco, paper in bales, rags and paper stock, rice, salt in bags, seeds, sumac, tin plates, wicker and willow (manufactured or otherwise), fine woods and woodenware, are warranted free of particular average unless caused by stranding, sinking, burning or collision with another vessel and amounting to 10 per cent.; bleaching powders, chemicals, china, crockery, drugs, dyestuffs, fertilizers and guano, fruit (preserved or dried), glass, glassware and other articles, liable to breakage, tobacco stems and musical instruments, are warranted free of particular average unless caused by stranding, sinking, burning or collision with another vessel and

amounting to 20 per cent.; bread, flax and sugar are warranted free of particular average under seven per cent.; cassia and cassia buds, coffee, chicle, gunny cloth, hemp, honey, hides and skins, ixtle, jute, madder, matting, nitrate of soda, oil cake, pepper and pepper shells, saltpetre, straw goods and jute butts, vanilla beans, are warranted free of particular average under 10 per cent.; broom root, jalap and sarsaparilla in bales are warranted free of particular average under 20 per cent. Not liable for particular average on molasses or other liquids, nor for breakage of merchandise unless occasioned by stranding or collision with another vessel. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the damaged portion only of the contents of the package, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable.

518 In case of loss or injury to any part of a machine, consisting, when complete for sale or use, of several parts, the insurers shall be liable only for the cost of the part lost or damaged. Warranted by the assured free from damage or injury from dampness, change of flavor, or decay, or from being spotted, discolored, musty or mouldy, unless caused by actual contact of sea water with the articles damaged, occasioned by sea perils. Warranted by the assured that interest insured under this policy shall be loaded under deck. Warranted by the assured that claims for damage on goods arriving at destination shall be reported to the Company within a reasonable time after arrival.

In the insurance of profits or commissions this Company is not to be liable for a greater amount than it would be under this policy on the merchandise from which the profits or commission accrue, and is entitled to the same salvage.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In witness whereof, the President of the said Saint Paul Fire and Marine Insurance Company hath hereunto subscribed his name, and caused the same to be attested by its Secretary, but this policy shall not be valid unless countersigned by William H. McGee, General Agent at New York.

C. H. BIGELOW, *President.*

A. W. PERRY, *Secretary.*

Countersigned this -- day of —, one thousand nine hundred and —.

— —, *General Agent.*

519 Provisions required by law to be stated on this policy:—
 "This policy is issued under and in pursuance of the laws of the State of Minnesota relating to Guaranty Surplus and Special Reserve Funds," Chapter 437, General Laws of 1909.

Stipulation.

United States District Court, Southern District of New York.

BENNER LINE, Libellant-Appellee,
against
FIELDS S. PENDLETON, Respondent-Appellant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, subsequent to the entry of an interlocutory decree herein on September 4th, 1914, pursuant to the mandate of the Circuit Court of Appeals for the Second Circuit issued August 27, 1915, as agreed by the parties.

Dated, November 11, 1915.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant-Appellee.
HENRY W. GOODRICH,
Proctor for Respondent-Appellant.

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Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

BENNER LINE, Libellant-Appellee,
against
FIELDS S. PENDLETON, Respondent-Appellant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of November in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the said United States the one hundred and fortieth.

ALEX. GILCHRIST, *Clerk.*

521

Notice of Motion to Dismiss Appeal

United States Circuit Court of Appeals for the Second Circuit.

BENNER LINE, Libellant-Appellee,
against
FIELDS S. PENDLETON, Respondent-Appellant.

SIR: Please Take Notice, that on the record filed on this appeal, and on the affidavit of D. Roger Englar hereto annexed, we will move

the United States Circuit Court of Appeals, for the Second Circuit, at
a stated Term thereof, appointed to be held in and for the Second
 Circuit, at the Court Rooms in the United States Court and Post
 Office Building, in the Borough of Manhattan, City and State of
 New York, on the 6th day of March, 1916, at 10.30 A. M. for an
 order dismissing the appeal in this action on the ground that this

522 Court has no jurisdiction to consider this appeal; that the
 only question presented by this appeal is *res adjudicata* as
 between the parties hereto; and that the record on appeal
 herein does not present any question for adjudication.

Dated, New York, February 17th, 1916.

Yours, etc.,

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant-Appellee.

64 Wall Street, New York City.

To Henry W. Goodrich, Esq., Proctor for Respondent-Appellant,
 49 Wall Street, New York City.

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Affidavit.

United States Circuit Court of Appeals for the Second Circuit.

BENNER LINE, Libellant-Appellee,
 against

FIELDS S. PENDLETON, Respondent-Appellant.

STATE OF NEW YORK,

County of New York, ss:

D. Roger Englar, being duly sworn, deposes and says:

That he is a member of the firm of Harrington, Bigham & Englar,
 proctors for the libellant-appellee in the above entitled action, and
 that he is familiar with all the proceedings in this action both in the
 United States District Court for the Southern District of New York,
 and in the United States Circuit Court of Appeals for the Second Cir-
 cuit.

That this is an appeal from a final decree made and entered herein
 in the United States District Court for the Southern District
 524 of New York on the 22nd day of July, 1915.

That this action was duly begun on or about November
 11, 1911, by the filing of a libel in said District Court, and the re-
 spondent duly appeared therein; and that on November 14, 1913,
 after a trial on the merits, an opinion was rendered in favor of the
 libellant but allowing respondent to limit liability and dismissing the
 libel as against Edwin S. Pendleton; and that on November 29th,
 a final decree was entered in said District Court to that effect.

On or about December 3, 1913, the libellant duly appealed from
 said final decree, and on or about August 10, 1914, this Court duly
 rendered a decision reversing the judgment of said District Court,
 and adjudging that the said defendant, Fields S. Pendleton, was

liable to libellant for the matters set forth in the libel herein; and on or about August 27, 1914, this Court duly issued its mandate in accordance with its said judgment, remanding the case to the District Court for further proceedings. The opinion of the said District Court is reported in Vol. 210 of the Federal Reporter, at page 67, and the opinion of this Court is reported in Vol. 217 of the

525 Federal Reporter at page 497.

On or about September 4, 1914, an interlocutory decree was duly entered referring the case to Edward L. Owen, Esq., as Commissioner, to fix the damages sustained by the libellant; that on May 29, 1915, the said Commissioner duly filed his report, a copy of which is set forth on page 3 of the purported transcript of record on this appeal. On or about June 14, 1915, exceptions thereto were filed by the respondent, a copy of which appears on page 14 of said purported transcript of record herein; on July 17th, an opinion was filed by Judge Augustus N. Hand, of the said District Court, overruling all of the said exceptions, a copy of which opinion is set forth on page 17 of said purported transcript of record herein. On July 22, 1915, a final decree was entered in the said District Court, a copy of which is set forth on page 20 of said purported transcript of record herein, by which decree said Commissioner's report was confirmed, and it was adjudged that this libellant recover of respondent the sum of \$44,441.01 with interest thereon until paid, and that the libellant have judgment and execution therefor.

On or about July 31, 1915, the respondent served upon the libellant a purported notice of appeal from the final decree of the said District Court, and assignments of error, copies of which are set forth on pages 23 and 24 of said purported transcript of record herein.

On or about the 11th day of November, 1915, the proctor for the appellant and the proctors for the appellee entered into a written stipulation, a copy of which is set forth on page 25 of said
526 purported transcript of record herein.

On the 24th day of November, 1915, the respondent-appellant served on the libellant-appellee a purported transcript of record, copies of which were filed in the office of the Clerk of this Court on or about the 29th day of November, 1915; and on or about the 8th day of January, 1916, the appellant and the appellee stipulated to place this cause on the present calendar of this Court and said stipulation was duly filed in the office of the Clerk of this Court on or about the 10th day of January, 1916. In said stipulation the libellant-appellee expressly reserved its right to move to dismiss the appeal herein.

Wherefore, your deponent respectfully prays that the appeal in this action be dismissed, for the reasons set forth in the notice of motion herein.

D. ROGER ENGLAR.

Sworn to before me this 18th day of February, 1916.

A. V. LYNCH, JR.

Notary Public, New York County.

527 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Benner Line. Libellant-Appellee, against Fields S. Pendleton, Respondent-Appellant. Affidavit and Notice of Motion. Harrington, Bigham & Englar, Proctors for Libellant-Appellee, 64 Wall Street, New York City. Service of a copy of the within affidavit and notice is hereby admitted this 18th day February, 1916. Henry W. Goodrich, Attorney for Appellant. Motion Granted. A. C. C.—H. G. W.—United States Circuit Court of Appeals, Second Circuit. Filed Feb. 24, 1916. William Parkin, Clerk.

528 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court-rooms in the Post Office Building, City of New York, on the 6th Day of March, 1916.

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

BENNER LINE, Libellant-Appellee,
v.
FIELDS S. PENDLETON, Respondent-Appellant.

A motion having been made herein by counsel for the appellee to dismiss the appeal herein;

Upon consideration thereof it is

Ordered that said appeal be and hereby is dismissed with costs.

Further ordered that a mandate issue accordingly.

A. C. C.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Filed Mar. 6, 1916. William Parkin, Clerk.

529 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages numbered from 1 to 44 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Benner Line, Libellant-appellee, against Fields S. Pendleton, Respondent-appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of May in the year of our Lord One Thousand Nine Hundred and Sixteen and of the Independence of the said United States the One Hundred and fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

530 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Fields S. Pendleton is appellant, and Benner Line is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed

531 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25324. Supreme Court of the United States, October Term, 1916. No. 500. Fields S. Pendleton vs. Benner Line. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Jul-7, 1916. William Parkin, Clerk.

532 Supreme Court of the United States, October Term, 1916.

No. 500.

FIELDS S. PENDLETON

v.

BENNER LINE.

It is hereby stipulated by the counsel for the respective parties herein that the record already on file with the clerk of the Supreme Court of the United States stand as the return to the writ of certiorari herein.

Dated New York July 6th, 1916.

AVERY F. CUSHMAN,

Counsel for Petitioner.

D. ROGER, ENGLAR,

Counsel for Respondent.

Endorsed: Pendleton v. Benner. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Jul-7, 1916. William Parkin, Clerk.

532½ To the Honorable the Supreme Court of the United States,
Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, July 7th, 1916.

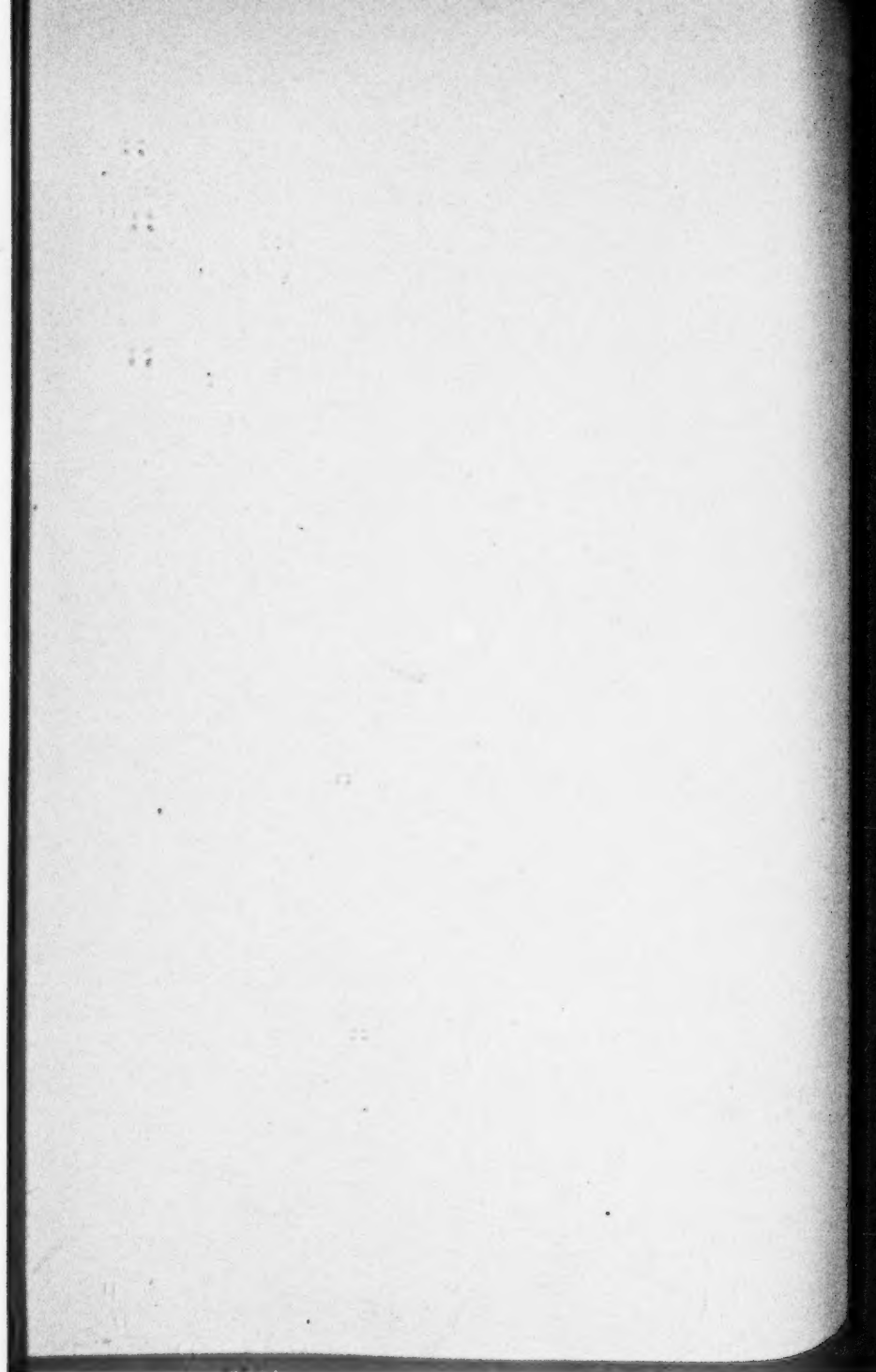
[Seal United States Circuit Court of Appeals, Second
Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of
Appeals for the Second Circuit.*

[United States internal revenue documentary stamp, 10 cents,
series of 1914.]

533 [Endorsed:] 500-16/25324. United States Circuit Court
of Appeals, Second Circuit. Benner Line v. Fields S. Pendle-
ton. Return to certiorari.

534 [Endorsed:] File No. 25324. Supreme Court U. S., Octo-
ber term, 1916. Term No. 500. Fields S. Pendleton, Peti-
tioner, vs. Benner Line. Writ of certiorari and return. Filed July
10, 1916.

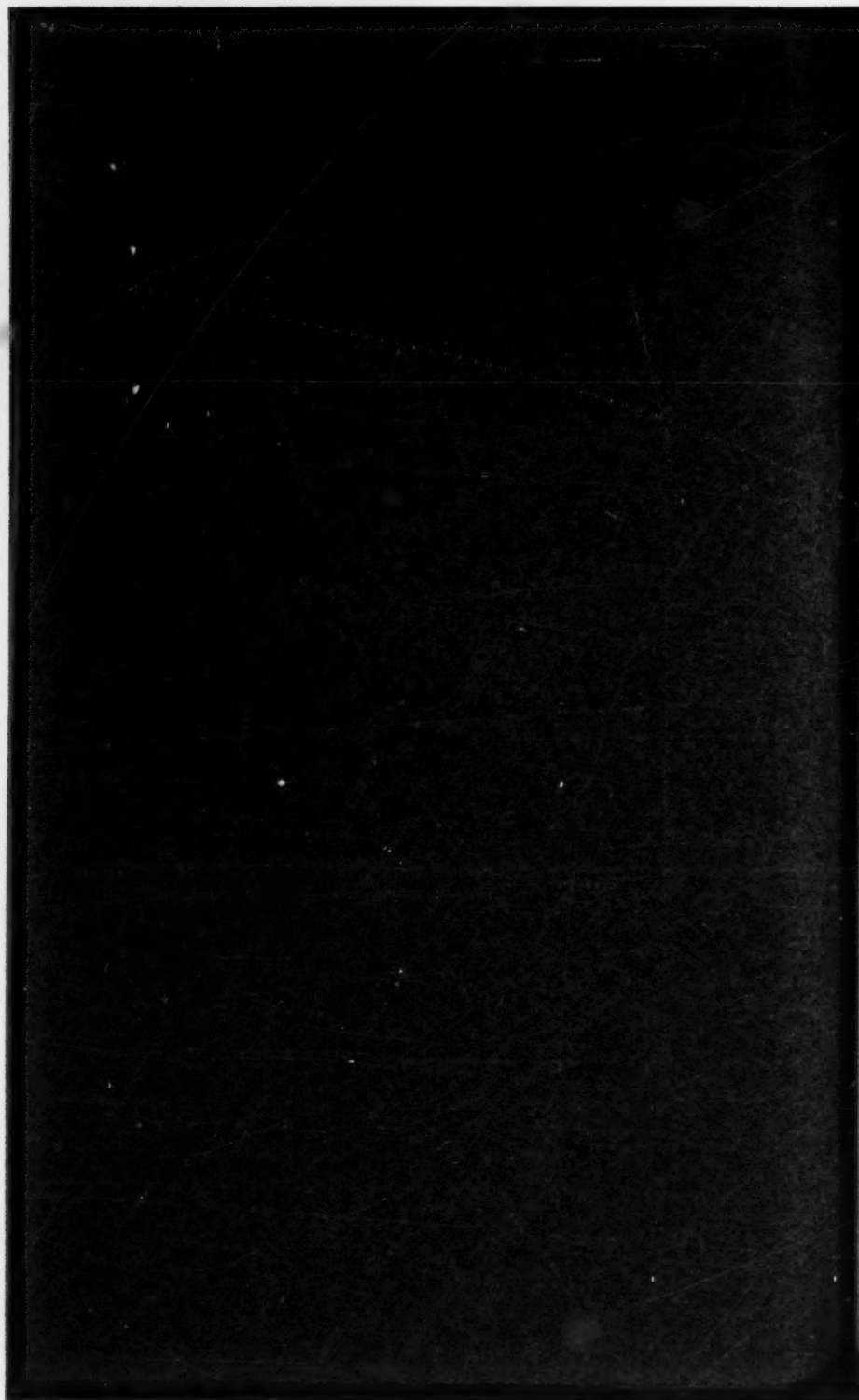


UNITED STATES

FOR THE YEAR OF 1911

AND
OF THE

HARVEY D. GOSWOLD
AT WASHINGTON



Supreme Court of the United States

OCTOBER TERM, 1915

No.

FIELDS S. PENDLETON,
(Respondent-Appellant)
Petitioner,

vs.

BENNER LINE,
(Libelant-Respondent)
Respondent.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of Fields S. Pendleton, the petitioner above named, respectfully shows as follows:

FIRST.—By reason of the facts hereinafter stated, a diversity of opinion now exists between the decisions of two or more United States Circuit Courts of Appeal upon a question of grave public importance.

Such diversity of opinion exists as to the proper construction of the statutes of the United States providing for the limitation of the liability of a shipowner and

more particularly of Section 18 of the Act of June 26th, 1884, entitled "An Act to remove certain burdens on the American Merchant Marine and encourage the American Foreign Carrying Trade and for other purposes," and which section reads as follows:

"The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. Provided that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowner."

The United States Circuit Courts of Appeal for the Second and Sixth Circuits have decided as the proper construction of this section that a shipowner cannot limit his liability for a loss occurring because of the unseaworthiness of the vessel that existed before the commencement of the voyage although such unseaworthiness was wholly without the owner's privity or knowledge, if the charterparty or contract for the use of the vessel was made personally by such shipowner although to be wholly performed by the ship and not in any particular personally by the shipowner.

Judge Rogers, speaking for the United States Circuit Court of Appeals in the Second Circuit in *Benner Line vs. Pendleton*, 217 F. R., 497, says:

"The rule that has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or

imputed to him by law; but he may not limit his liability upon contracts which he personally makes or upon obligations which he personally assumes. If the particular contract is made by the shipowner in person it is a matter of no consequence so far as the question now under consideration is concerned whether it relates to and binds a particular vessel or not. By a 'personal contract' we understand to be meant a contract made by the person or corporation to be bound as distinguished from one imputed to such person or corporation."

Judge Severens, speaking for the United States Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Line vs. Mills Transportation Company*, 155 F. R., 11, at page 16, says:

"The purpose of Congress was, as we think, to relieve the shipowner from the consequences of those extraordinary risks which were imposed without limitation by the law of Admiralty as that law has been interpreted in this country. And by extraordinary risks we mean those risks arising from the conduct of, and contracts made by those who are beyond the personal supervision and control of the owner and yet have legal authority to bind them to answer for their conduct or contracts; or to express the thought another way, that the liabilities intended by this legislation were those peculiar to him as a shipowner and had been imputed to him because of his relation to the ship and not those liabilities whether for torts or from contracts, which spring from his own personal conduct or stipulations. It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made

about anything else and would be enforced in the courts in common law actions. It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs or be given such an immunity as to make his stipulations of uncertain value."

On the contrary, the United States Circuit Court of Appeals for the First Circuit has decided as the proper construction of this section: that under such circumstances even though the shipowner makes his personal contract if it is to be performed by the ship and if he is without privity or knowledge he may limit his liability for a loss occurring because of unseaworthiness before the commencement of the voyage under said section.

Judge Putnam, speaking for the United States Circuit Court of Appeals for the First Circuit, in *Quinlan vs. Pew*, 56 F. R., 111, at page 119, says:

"Neither can the proposition of the appellant be maintained that the statute does not apply because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as to those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped. That there may be certain contracts, relating not so much to navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may well be contended, without at all touching the principles here involved."

SECOND.—A libel in a cause of Admiralty Jurisdiction was duly filed on November 11th, 1911, by the above named respondent in the District Court of the United States for the Southern District of New York to recover against your petitioner damages caused by the loss at sea of a cargo of merchandise, of which the said respondent was bailee, while laden on board the schooner "EDITH OLCOTT" on a voyage from the port of New York to San Juan, Porto Rico. The respondent itself suffered no damages, as it owned none of the cargo, but sued to recover solely as bailee. Your petitioner was at the time of the making of the charterparty hereinafter mentioned the owner of nine-sixteenths of the said schooner "EDITH OLCOTT" and was such owner at the time of her loss and the loss of said cargo and was the only owner proceeded against. And no other person as partner in or connected with the co-partnership of Pendleton Brothers hereinafter mentioned was interested in said vessel as part owner or otherwise. That the basis of the cause of action against your petitioner was claimed to arise under a charterparty made between Pendleton Brothers, a co-partnership, agents of the schooner "EDITH OLCOTT," which co-partnership was engaged in and prosecuting the general business of ship brokers in the chartering of ships and otherwise, and the respondent, whereby the said "EDITH OLCOTT" was chartered by the owners through their said agents to the above named respondent for a voyage from the port of New York to the port of San Juan, Porto Rico, the said charterparty containing a clause providing that said vessel should be tight, staunch, strong, and in every way fit for such a voyage; but that said vessel was not seaworthy at the beginning of the voyage in accordance with the contract contained in said charterparty. The bills of lading of the cargo taken on board were signed by the co-partnership name by another member of the said co-partnership. Said vessel

was abandoned at sea and became a total loss on August 7th, 1910. That an answer was interposed by your petitioner to the libel on December 28th, 1911, and among other things your petitioner set up as a defense that he was entitled to the benefit of the Statutes of the United States providing for the limitation of the individual liability of a shipowner and further that any unseaworthiness of the vessel before the commencement of the voyage or during the same was without his privity or knowledge.

That the action came duly on for trial in the District Court of the United States for the Southern District of New York and it was found that the vessel was unseaworthy before the commencement of the voyage, but that such unseaworthiness was without the privity or knowledge of your petitioner and that he was entitled to the benefit of the Statutes of the United States providing for the limitation of the liability of a shipowner and a final decree was entered November 29th, 1913, dismissing the libel (*Benner Line vs. Pendleton*, 210 F. R., 67).

The respondent appealed to the United States Circuit Court of Appeals for the Second Circuit from such final decree and such proceedings were had therein that the Court reversed the same as hereinbefore pointed out on the grounds that your petitioner as such part owner was not entitled to a limitation of his liability, although the unseaworthiness of the vessel before the commencement of the voyage was without his privity or knowledge, under the provisions of Section 18 of the Act of June 26th, 1884, because the making of the charterparty in the manner stated and heretofore referred to constituted the personal contract of the petitioner as such owner and that under said Section 18 of the Act of June 26th, 1884, or under the provisions of any of the other statutes of the United States providing for the limitation of the liability of a shipowner he could not be relieved from his personal contract (*Benner Line vs. Pendleton*, 217 F. R., 497).

The United States Circuit Court of Appeals for the Second Circuit thereupon issued its mandate to the District Court of the United States for the Southern District of New York and among other things directed the entry of an interlocutory decree to ascertain the damages of the respondent and such proceedings were had in that Court as resulted in the entry of a final decree against your petitioner in the sum of \$44,441.01 on July 22nd, 1913. From such final decree your petitioner duly appealed to the United States Circuit Court of Appeals for the Second Circuit and such proceedings were had that the said Court dismissed the appeal of your petitioner on the ground that the record presented no new questions and that the Court had already decided the questions involved in the appeal and issued its mandate to the District Court of the United States for the Southern District of New York and said Court thereupon rendered its final decree upon such mandate against your petitioner for the sum of \$46,197.20 on March 14th, 1916.

THIRD.—That the question presented herein is of grave importance to the public and to the large number of persons who own parts of or the whole of vessels and to owners of parts of vessels who act for the vessel and her other owners as her agents as it involves the interpretation and construction of statutes of the United States providing for the limitation of the liability of a shipowner and has a most important bearing upon the business carried on by shipowners throughout the United States and the proper methods of transacting such business. That the business of shipping and shipowning in the United States is now large, and owing to circumstances now existing is constantly increasing. By reason of the diversity of opinion heretofore mentioned between the United States Circuit Courts of Appeals for the First Circuit and for the Second and Sixth Circuits a different

construction of the statutes of the United States relating to the limitation of the liability of a shipowner will be applied in an action brought in the Port of New York, the port in which is carried on the largest shipping business in this country, and the Port of Boston, in which is carried on the next largest. In the Port of New York, under the circumstances stated herein such owner would be held *insolido* for all the damages occasioned and in the Port of Boston he would be relieved from all liability.

QUESTIONS FOR THE CONSIDERATION OF THIS COURT:

FIRST.—Under the limitation of liability Statutes of the United States, can a shipowner, free from privity or knowledge of the unseaworthiness of his ship, limit his liability for loss of cargo occurring on a voyage because of unseaworthiness existing before the voyage was commenced where the charterparty of the vessel for the voyage was personally made on behalf of all the owners of the ship by such individual owner?

SECOND.—Is a charterparty of a ship named therein made by an individual owner on behalf of himself and other owners, he acting as their agent, a personal contract of such owner actually signing the charterparty so that he cannot limit his liability for a loss of cargo occurring by reason of unseaworthiness before the commencement of the voyage which unseaworthiness was without his privity or knowledge?

THIRD.—Does Section 18 of the Act of June 26th, 1884, when properly construed permit a shipowner to limit his liability as provided therein under a charterparty naming a ship and actually signed by him on behalf of himself and other owners to be performed by the ship named therein

when a loss of cargo occurs on a voyage by reason of unseaworthiness of the vessel of which he was without privity or knowledge?

FOURTH.—Is a limitation of liability permitted under such statute when an individual part owner actually signs the charterparty for the ship and her owners for and in the name of a co-partnership of ship brokers of which such part owner was one of the partners?

FIFTH.—Is there a diversity of opinion upon these questions now existing between two or more United States Circuit Courts of Appeal?

SIXTH.—Is the question here presented one of grave public importance involving as it does great business interests and the proper construction of statutes of the United States relating to the limitation of liability of ship-owners?

WHEREFORE your petitioner prays that this Honorable Court will cause a writ of *certiorari* to be issued requiring the United States Circuit Court of Appeals for the Second Circuit to certify the whole of the record herein so that this Court may act thereon as of right and according to law ought to be done.

AVERY F. CUSHMAN,
Counsel for Petitioner,
130 Pearl Street,
New York, N. Y.

HARVEY D. GOULDER,
Cleveland, Ohio,
of Counsel.

United States of America,
Southern District of New York, } ss.:

FIELDS S. PENDLETON, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

FIELDS S. PENDLETON.

Sworn to before me this
22nd day of May, 1916.

JOHN F. CASEY,
[Seal] Notary Public for New York County No. 307.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and is entitled to the favorable consideration of this Court.

Dated, New York, May 22nd, 1916.

AVERY F. CUSHMAN.

Sirs:

PLEASE TAKE NOTICE that the foregoing petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Monday, June 5th, 1916, at the Capitol in the City of Washington, D. C., at the opening of the Court on that day.

Dated, New York, May 22nd, 1916.

AVERY F. CUSHMAN,
Counsel for Petitioner,
130 Pearl Street,
Borough of Manhattan,
New York, N. Y.

To

HARRINGTON, BINGHAM & ENGLAR,
Proctors for Benner Line.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No.

FIELDS S. PENDLETON,
(Respondent-Appellant)
Petitioner,

vs.

BENNER LINE,
(Libellant-Respondent)
Respondent.

BRIEF FOR PETITIONER.

FIRST POINT.

The United States Court of Appeals for the Second Circuit erred in holding that the petitioner was not entitled to limit his liability under the statutes of the United States on the ground that the charterparty signed by him for the vessel was his personal contract.

The petitioner, the only owner proceeded against, was the owner of nine-sixteenths of the "EDITH OLCOTT" at the time of her loss and when the charterparty was made. The charterparty was made between Pendleton Brothers, a co-partnership, agents of the schooner "EDITH OLCOTT," and the respondent and signed with

the firm name of Pendleton Brothers by the petitioner. The petitioner was not to perform any personal service in order to earn the charter money, nor had he any connection whatever with it other than as a member of the brokerage co-partnership that for the usual commission paid it, negotiated the charterparty, and in the usual course signed it as their agents for a disclosed principal, the "EDITH OLCOTT" and her owners. It was the act of the firm of brokers and as such bound the principals named as an act performed for the ship and owners by an authorized agent, to wit, the firm of Pendleton Brothers. The petitioner did not intend nor did he in fact or in law personally, except as a broker, have part in negotiating such charter, but shared in it only as one of the firm of Pendleton Brothers and that firm of brokers could not and expressly did not attempt to execute the charterparty as agents for any one soever, except the ship and her owner, that is, all the owners of that ship. The owners are to furnish a vessel named the "EDITH OLCOTT" owned by them to make the voyage specified and earn the compensation. The petitioner was a member of the co-partnership of Pendleton Brothers and as such member of the firm actually signed that firm name to the charterparty. The petitioner signed none of the bills of lading under which the cargo was carried. The charterparty named the "EDITH OLCOTT" as the vessel that was to perform the service and earn the compensation therefor. The petitioner has been found as a matter of fact by all the Courts to have been himself free from privity or knowledge of the unseaworthiness of the "EDITH OLCOTT" before the commencement of the voyage and that he used every effort and expended all the money that a reasonable man could or should to render her in all respects seaworthy. The petitioner has been, however, held liable for all the damages occasioned by the loss of cargo as if he himself made the contract

for himself individually thus because he was a part owner it was his personal contract and that in this personal contract *he* agreed that the vessel should be tight, staunch and in every way fitted to complete the voyage, in other words warranted her seaworthiness. Because the charterparty was his personal contract and although he was the owner of only a part of the vessel he has been held liable *insolido* for all the damages occasioned and consequently denied the right to limit his liability under all and any of the statutes of the United States relating to the limitation of the liability of a shipowner.

The United States Court of Appeals for the Second Circuit has based its ruling in this case, *Benner Line vs. Pendleton*, 217 F. R., 497, upon the decision made previously by it in the "LOYAL" case, 204 F. R., 930, the decision in that case in its turn was based on the principles of law laid down in the decision by the United States Circuit Court of Appeals for the Sixth Circuit in the *Great Lakes Towing Company vs. Mills Transportation Company*, 155 F. R., 11.

Passing any question of dissimilarity of facts, the United States Circuit Court of Appeals for the Sixth Circuit held that a personal contract existed and that, therefore, the statutes providing for a limitation of liability could not apply; but however that may be it was in the case at bar and in the "LOYAL" preceding it in the same Second Circuit considered to enunciate the broad general doctrine that if a part owner was in any manner connected personally in any capacity with the act of chartering even as under the facts of the case at bar he cannot have the benefit of the statutes providing for the limitation of liability.

And so Judge Rogers, in the opinion in this case, states: "This Court decided in the 'LOYAL' (*Lacombe, Ward and Noyes, C. J. J.*) that a shipowner is not entitled to a limitation of liability for breach of his personal contract."

The decision in the "LOYAL" case was concurred in by all the Judges, but Judge Ward, concurring in the results, said:

"But I cannot concur in the conclusion that the petitioner is deprived of the benefit of the acts on the ground that it has personally contracted to do the lighterage business of the Apollinaris Company, the owners of the cargo, for a fixed term. The contract contained no agreement on the subject of unseaworthiness at all. The law itself imposed the duty. The breach of the implied warranty of seaworthiness is a tort, a breach of duty rather than a breach of personal contract. If the implied warranty of seaworthiness is to be regarded as a personal contract shipowners cannot limit their liability in the case of the death of or injury to passengers at all because the law implies in the contract of carriage a duty to carry with care. Nor can they ever limit in the case of loss or damage caused by unseaworthiness to cargo carried under bills of lading, at least when signed by them as owners as is the case with all regular steam lines. Such results would, I think, be a great surprise to all interested."

He then cites *Quinlan vs. Pew*, 56 F. R., 111, and quotes from the decision therein.

Judge Lacombe, the third member of the Court, filed the following memorandum:

"The Courts of Appeal in the First and Sixth Circuits seem not to be in accord as to the interpretation of the section under consideration. The question is a close one, but I am inclined to concur with Judge Noyes in holding that this case presents a personal contract of the owner, not affected by the stat-

ute. It would seem desirable that some effort should be made to secure a construction of the act by the Supreme Court which will insure future uniformity of decision."

Upon the hearing in the case at bar, the Court (Coxe, Rogers and Hand, JJ.) was differently constituted than at the hearing in the "LOYAL" case and the Court accepts that case as controlling its decision.

The "LOYAL," the case above referred to, as has been said, was the basis of the decision in this case and the same rule was applied and it was held that the facts established a personal contract, but the Court in the prevailing opinion goes farther and uses certain language from which it could be inferred that an owner of a vessel or a part owner signing a charterparty to furnish a certain ship for a certain voyage makes by such charterparty his personal contract and thereby makes himself even though he be but a part owner liable for all the damages occurring by reason of unseaworthiness and thereby puts himself without the benefit of limitation under the statute for all the consequences of unseaworthiness notwithstanding the fact that he was without privity or knowledge of such unseaworthiness.

There is no case before the "LOYAL" in which the decision has helded that an owner or part owner of a vessel who shows and it is found as a fact that he was without privity or knowledge of the unseaworthiness of his ship has been refused limitation because he personally signed the charterparty as the agent of the owners that was wholly to be performed by the ship and which could only be performed by the ship to earn the money named in the charterparty.

As is said in this case the Court followed the principles of law as laid down in the "LOYAL" case and has decided this case in which the facts appear as above stated and

has held that even though the petitioner was without privity or knowledge of the unseaworthiness of his vessel because the charterparty was his personal contract he cannot limit his liability.

SECOND POINT.

The Circuit Court of Appeals erred in holding that the contract contained in the charter of the "Edith Olcott" under which the cargo lost was carried was a personal contract of the petitioner such as to prevent the application of the statutes providing for the limitation of liability of a shipowner.

Under the decision of *Quinlan vs. Pew*, 56 F. R., 111, it has been generally understood and followed by the Courts that the owner of a ship, free from privity or knowledge of her unseaworthiness, could limit his liability for unseaworthiness even though he had signed the charterparty on behalf of himself and other owners, and until the decision of the "LOYAL" case, followed by the decision in this case, such was generally considered to be the law.

Under the decision in the case at bar it is held that every owner of the whole, or of a part of a ship who actually signs a charterparty in any connection or capacity soever, even by signing the firm name of a co-partnership of brokers, his membership therein requiring to be shown by extraneous evidence is conclusively presumed to be privy to and knowing every detail of the vessel's construction, equipment and apparatus and that no matter how careful he has been in employing the best of workmen and furnishing the best of material and expending all the money necessary he must still bear the whole of any loss occasioned by unseaworthiness.

THIRD POINT.

The Act of June 26, 1884, Section 18 thereof, was intended to provide for a situation such as is presented in this case.

By the language of the Act of June 26, 1884 (23 Statute at Large, pages 53-57), it is declared that the aggregate liabilities of the owners of a ship shall not exceed the value of the vessel and freight pending. There is nothing said in this act about a personal contract. The language of the statute has been in one instance broadly construed by this Court upon another question, *Richardson vs. Harmon*, 222 U. S., 96. In that case the Court has interpreted the word "liabilities" as used therein to include both maritime and non-maritime liability.

In that case this Court said with regard to Section 18 of the Act of June 26, 1884, as follows:

"The Legislation is in *pari materia* with the Act of March 3, 1851 (9 Statutes, 635c, 43), as carried into the revised statutes as Section 4283 et seq., and must be read in connection with that law, and so read, should be given such an effect not incongruous with that law so far as consistent with the terms of the later legislation."

The section of the Act of 1851 referred to is as follows:

"That the liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, any loss, damage or injury by collision, or for any act, matter or thing lost, damages or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of

the interest of such owner in such vessel, and her freight then pending."

Also, this Court, in the case of *Butler vs. Boston Steamship Company*, 130 U. S., 527, Mr. Justice Bradley writing, referring to Section 18 of the Act of June 26, 1884, said:

"The language is somewhat vague it is true; but it is possible that it was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner. But it is not necessary to decide this point in the present case."

Judge Webb of the District of Maine, in interpreting Section 18 of the Act of June 26, 1884, in the case of the *Giles Loring*, 48 F. R., 463, at page 475, says:

"The well known object of this statute was the increase of American shipping by a reduction of the burdens of shipowners. That end would be promoted by discharging part owners from a liability in solido for the debts of each other. A construction giving such discharge is consistent with the language of the Act, conforms with the intention of Congress and regards strictly the defect to be corrected. No principle of interpretation requires a different construction to the first clause of this Section 18, and no other construction gives to it an effect so salutary and so helpful to owners, whose interest it aims to serve."

The Circuit Court of Appeals for the Third Circuit, in *Cook vs. Smith*, 187 F. R., 538 at page 541, quotes the above with approval and says,

"one of its purposes evidently was to encourage our Merchant Marine by relieving part owners of ships of some of the liabilities theretofore imposed on them."

* * * "The intent of Congress was to break the solidarity of responsibility."

FOURTH POINT.

There is a diversity of opinion now existing between two or more United States Circuit Courts of Appeal upon the question here presented.

As is shown in the petition herein by excerpts from the opinions rendered by the Circuit Courts of Appeal for the First, Second and Sixth Circuits there can be no question but that there is a direct diversity of opinion among circuits.

Great Lakes Towing Co. vs. Mills Transportation Co., 155 F. R., 11 (6th Circuit).

Benner Line vs. Pendleton, 217 F. R., 497 (2nd Circuit).

The Loyal, 204 F. R., 930 (2nd Circuit).

Quinlan vs. Pew, 56 F. R., 11 (1st Circuit).

FIFTH POINT.

The question here presented is one of grave public importance and involves the construction of a statute of the United States providing for the limitation of liability of a shipowner.

There is shown by the facts stated in the petition and there would seem to be no question that with the rapid

increase and growth of the business of shipping in this country brought about in a great measure by the European War and other circumstances closely related to it, that the interests involved will be much greater as time goes on. It would seem therefore to be proper that this Court should decide this grave question in order that there may be a uniformity throughout the whole United States in the application of so important a statute as that providing for the limitation of liability of a shipowner for loss accruing without his privity or knowledge and growing out of contracts. Thus it will be known to a certainty what are the risks a person desiring to invest his money and employ his time in the business of shipowning would run in the whole United States. As the decision now stands, with the existing diversity of opinion a person who engages in the business of shipowning would be in one part of the United States able to escape entirely the results of the unseaworthiness of his vessel if he were without privity or knowledge of such unseaworthiness and in another part of the United States under the same circumstances be deprived of his entire investment as well as his whole fortune.

THE PETITIONER TAKES THE LIBERTY TO ANNEX TO THIS BRIEF AND DESIRES THAT THEY BE CONSIDERED AS PART THEREOF TWO EXHIBITS.

Exhibit A. An opinion rendered to the petitioner at his request by Honorable E. Henry Lacombe, lately Judge of the United States Circuit Court for the Second Circuit and one of the Judges who sat in the United States Court of Appeals in the Second Circuit and participated in the decision in the "LOYAL" case.

Exhibit B. An opinion lately rendered by the Honorable Charles M. Hough, a Judge of the District Court of

the United States for the Southern District of New York in the case of the "JULIA LUCKENBACH" in which he has commented upon the decision in this case, which decision has not yet been published in any of the Law Reports or as to become accessible.

LAST POINT.

It is respectfully submitted that the writ of certiorari should be granted herein directing the United States Circuit Court of Appeals for the Second Circuit to certify the whole of the record herein to this Court.

ARTHUR F. CUMMINS,
Counsel for Petitioner.

HENRY D. CHITLOE,
of Counsel.

Exhibit "A."

49 Wall Street,
April 22nd, 1916.

Fields S. Pendleton, Esq.,
130 Pearl Street,
New York, N. Y.

Dear Sir:

My opinion is asked as to the chances of success should application be made for certiorari to review a decision of the Court of Appeals, Second Circuit, in Benner Line, libellant, vs. Fields S. Pendleton, respondent. The question to which attention is directed is whether upon the record the respondent may limit his liability to the value of his vessel, the schooner "EDITH OLCOTT" and her pending freight, under the Act of June 26th, 1884 (supplementary to the old Limitation of Liability Act of 1851); or whether he must be denied the benefit of that on the ground that his liability arises upon his personal contract. The vessel sprung a leak and sank at sea, libellant's claim is for loss of cargo.

The case was tried in the District Court, Southern District of New York. That court held that although the owner believed the vessel to be seaworthy and had used every reasonable effort to make her so, she was in fact not seaworthy when the voyage began. It further held that the agreement under which the cargo was carried was the owner's agreement chartering the schooner and was an agreement made in the conduct of the business of the schooner. That the charterparty could not be regarded as the mere personal contract of Pendleton Brothers, who in signing it acted as agents of the owners. The District Court, therefore, held (210 F. R., 67) that respondent

could take the benefit of the statute and directed that testimony be taken as to whether there was any pending freight; the vessel was a total loss with no remnants.

Appeal was taken and on August 14th, 1914, the C. C. A. (217 F. R., 497) (Coxe, Rogers and Learned Hand, J.J.), handed down an opinion affirming on all other points, but reversing as to limitation of liability and directing further proceedings to ascertain the amount of libellant's claim. Mandate issued in due course and was filed in the District Court, which proceeded in accordance with the mandate to take testimony as to the claim. In the process of taking this testimony evidence came in, bearing, it is contended, on the question whether the contract was or was not personal. The District Court, Augustus Hand following the C. C. A., and holding that the new testimony did not change the situation, entered a decree for the full amount of loss found by the commissioner, who took the testimony.

Appeal was taken to C. C. A. Motion was made to dismiss the appeal on the ground that it presented no question other than the one already decided adversely to respondent. This motion was granted, without opinion. 1916.

Confining this opinion then to the concrete question above stated:

After the passage of the statute of 1884 it was repeatedly held that limitation of liability could not be obtained if the claim were one arising from a personal contract of the shipowner. As Judge Addison Brown expressed it in the *Amos D. Carver*, 35 F. R., 665, the Act "does not restrict the liability of owners upon their own personal contracts but only their liability *on account of the vessel*; that is the liability that is imposed on them by law in consequence of their ownership of the vessel, viz: for the contracts or acts of the ship or her master, without the owner's express intervention." In that case the claim

was for supplies furnished in the home port upon the personal contract of the owners. Similar cases are *McPhail vs. Williams*, 41 F. R., 61; *Gorky vs. Fort*, 44 F. R., 364; *Rudolph vs. Brown*, 137 F. R., 106. This proposition is now well-settled law; the only question arising in each new case being whether the claim arises from a personal contract or not.

In *Richardson vs. Harmon*, 222 U. S., 96, a steam barge collided with a bridge. Under the Act of 1851 there would be no right to limit, because it was a non-maritime tort. The Court referring to the Act of 1884 held that "in view of the manifest policy of Congress to further encourage the ship-owning industry," the use of the phrase, "*debts and liabilities*" brought liabilities *ex delicto* as well as *ex contractu* within the Act. This certainly was not a narrow construction of the Act; on the contrary it might be taken to indicate that, so far as its text permitted, it should be construed to carry out the intent of Congress.

In 1907 the case of the Great Lakes Towing Company vs. Mills Transportation Company came before the C. C. A., Sixth Circuit (Lurton, Severens and Richards, Circuit Judges), 155 F. R., 11. The Mills Company had made an express written contract with the Towing Co., by which the latter agreed to do all the wrecking and towing services required by the Mills Company for its boats and the Mills Company was to pay for the services so rendered on a stated tariff for the different kinds of work done, including wrecking or bottom work. The Mills Company's steamer "NEWAGO" being stranded, that company telegraphed the Towing Company asking that a wrecking outfit be sent to her relief. This was done, but the "Newago" was lost, except remnants. When asked to pay according to the stated tariff for these services, the Mills Company tried to limit its liability.

It seems to me that the contract here was a personal one and that the decision denying the right to limit was

correct. The opinion, however, is a long one and clearly indicates that the Court is inclined to give the statute quite a close construction.

On the contrary is *Quinlan vs. Pew* (1893), the C. C. A., First Circuit (Colt and Putnam, C. J., Aldrich, D. J.), gave it a liberal construction saying that if the contention of the complainant in that case should prevail "the wings of the Statute would be effectually clipped."

In this state of the law the case of *O'Brien Bros. vs. Lighter "LOYAL,"* came in 1913 before the C. C. A., Second Circuit (Lacombe, Ward and Noyes, Circuit Judges), 204 F. R., 930. The claim was for salvage services to a lighter and her cargo; the lighter was lost but cargo saved. The cargo belonged to the Apollinaris Company which had a contract with J., owner of the lighter, by which J. undertook to do all the lighterage work which the A. Company might require, i. e., to furnish lighters when needed, none of such lighters being named. Transport being required for 622 cases the A. Company called on J. who sent the "Loyal," an unseaworthy vessel. The Trial Judge held that the A. Company, whose cargo was libelled and who had brought in J. was entitled to insist that recovery should be had against J. The next question would be whether J. could limit his liability under the Statute, assuming that he had no knowledge or privity. If the vessel were libelled he might do so under the Statute; but Judge Holt held that J.'s obligation to respond for salvage to cargo arose not from the circumstances that it was carried on his vessel, but because he made a personal contract with A. Company to lighter all their cargoes, and that contract must be construed as importing a warranty that the lighters he furnished should be seaworthy.

Judge Noyes quoted with approval from the *Mills* case *supra*: "the liabilities intended by this legislation were those peculiar to him as shipowner and which had been

imputed to him because of his relation to the ship and not those liabilities, whether for torts or from contracts, which spring from his own conduct or stipulations." He then says that the lighterage contract was signed by the owner and was his personal contract. That such contract carried with it the implied contract that the lighters to be furnished under it should be seaworthy. "The implied contract that the lighter was seaworthy, attached to the express contract, was just as much the personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract. The liability which the owner assumed was a liability springing from his own stipulation and not imported."

Judge *Ward*, on the contrary, pointed out that the contract contained no engagement on the subject of seaworthiness at all. That the law itself imposed the duty. That the breach was "a breach of duty rather than a breach of personal contract." He further points out that if the rule suggested by Judge *Noyes* be followed—a shipowner cannot limit liability, in case of a loss (by unseaworthiness) of cargo carried under bills of lading when signed by owners, as is the case with all regular steam lines, adding "Such results would be a great surprise to all interested," and quoting from Judge *Putnam* in *Quinlan vs. Pew*, *supra*. Judge *Ward* nevertheless voted to affirm on the ground that there was no sufficient proof of want of privity or knowledge of unseaworthiness by the owner.

Judge *Lacombe* called attention to the circumstances that the C. C. A. in First and Sixth Circuits were not in accord in their construction of the Statute; that the question was a close one, but he was inclined to concur with Judge *Noyes* in the disposition of the case at bar.

He further expressed the hope that some effort would be made to have the question decided by the Supreme Court. *Certiorari* is apparently the only way in which such question can be presented to that court. Certification is

proper only when a C. C. A. needs instruction in order to reach a conclusion, and presumably, whenever this question comes before a court of three there will be at least a majority in favor of an affirmative or a negative answer. Certiorari was not available in the *LOYAL* case, because the lack of proof pointed out by Judge Ward would have defeated petitioner, whichever way the statutes were construed.

The next to come before a C. C. A. was the *Benner* case about which opinion is now asked. It seems to restrict the relief accorded by the Statute more closely than did the decision in the case of the *LOYAL*.

The *Benner* Company was engaged in business as carrier, operating a line between New York and Porto Rico. It chartered the Schooner "*EDITH OLCOTT*," of which respondent owns nine-sixteenths and loaded her with general merchandise which it had undertaken to carry for shippers. There is nothing peculiar about the charterparty; it is in the usual form, providing that the vessel shall be tight, staunch, strong, etc., and that bills of lading are to be signed without prejudice. While at sea she sprung a leak, and despite continued efforts to keep afloat, sank in the open ocean, vessel and cargo a total loss. The Trial Judge (Holt, D. J., 210 F. R., 67) held that she was unseaworthy at the commencement of the voyage. This finding was sustained on appeal. He further held that such seaworthiness was without the privity or knowledge of the owner. The Appellate Court expressed no opinion as to this finding. It seems to be sound; the testimony abundantly supplied what Judge Ward found to be lacking in the *LOYAL* case. Judge Holt distinguished the case from those of the *Mills* Company and the *LOYAL* on the ground that the contracts in both those cases did not specify any particular vessel; whereas in the case at bar the charterparty (signed by the owner's agents) was the charter of a named vessel, was a contract made in the

conduct of the business of such vessel and was therefore within the terms of the Act of 1884.

The C. C. A. (Judge Rogers writing the opinion) disagreed with this reasoning and conclusion, holding that the claims which were the subject of the libel were claims arising upon the charterparty and that the charterparty was the personal contract of the owner.

It may be noted that the Benner Line, so far as the record discloses, lost nothing by the shipwreck; certainly in this libel no claim is presented for any such loss by it. It filed the libel as bailee of the owners of the cargo which was lost. A point is made that it could not maintain such a libel but such point is not considered here; it will be assumed that libelant came properly into court as representative of the injured cargo owners. But, granting that, the fact remains that the claims to be established are the claims of the cargo owners; if they have no claim for lost cargo, neither the Benner Company nor they themselves can recover. When, however, we look for the source of their claims against the schooner it is found to be, not in the written contract between the Benner Company and the vessel owner, to which no cargo was a party, but in the bills of lading under which their merchandise was taken abroad. That being so it is difficult to see what the charterparty has to do with the case. If the bills of lading, issued to cargo owners, were signed by the master they bound the vessel and the shipowner's liability was one imputed to him by reason of his ownership of the vessel and within the terms of the Act. If these bills of lading were in fact signed by the owner himself, the same point is presented on which Judge Noyes and Judge Ward differed, and in which as may be seen by Judge Putnam's opinion in *Quinlan vs. Pew*, *supra*, the C. C. A., First Circuit, is in accord with Judge Ward.

It now appears that on the trial before Judge Holt—the only bills of lading offered in evidence were the cap-

tain's copies which were signed by respondent, being merely copies of the originals which had been made for the use of the master, according to a well-known practice. Upon the reference, however, it developed that none of the bills of lading handed to the shippers and forming the contracts under which the goods were carried were signed by respondent. It may well be that this circumstance makes respondent's case stronger, but on the question of whether or not an application for certiorari may fairly be advocated before the Supreme Court, the circumstances seem not important; whoever signed the bills of lading, diversity of judicial opinion as to liability exists.

With a crowded calendar it is naturally to be expected that the Supreme Court will not readily grant certiorari whenever there may be some diversity of opinion between circuits on some proposition of general law. But the strong point of your application, should you decide to make one, is that the diversity here is as to the construction of a Federal Statute; as now construed one rule of law will be applied if a vessel is libelled in the port of Boston and a different rule if it is libelled in the port of New York.

That such a diversity exists as to the proper construction of the 18th section of the Act of June 26, 1884, seems manifest from what has been written *supra*. That it is likely to continue is highly probable. The opinion of the C. C. A., First Circuit, in *Quinlan vs. Pew*, written by the present senior Judge of that Court, was concurred in by both his associates; there was no such dissent as is found in the *LOYAL* case, on which the opinion in this *Benner* case is founded. It is hardly to be supposed that, in some future case, the C. C. A., First Circuit, which first of Appellate Courts construed this section, will reverse itself because subsequently the C. C. A. of some other circuit has adopted a different construction; especially

when its own opinions is concurred in by Judges who have had such extended experience in admiralty,—long prior even to their elevation to the bench,—as Judge Ward and Judge Hough have had. See opinion of the latter in the *JULIA LUCKENBACH* (not yet reported).

Replying, then, to your request, I would say that, in my opinion, you have a reasonable chance for obtaining a writ of certiorari from the Supreme Court. I remain,

Very truly yours,

E. HENRY LACOMBE.

Exhibit "B."

W. J. McCahan SUGAR REFINING
COMPANY

against

The Steamship *JULIA LUCKENBACH*.

HOUGH, D. J.:

The first inquiry is as to the value of the *Luckenbach* in her injured condition in May, 1912. The libel was originally filed for \$60,000 and the vessel was discharged on a stipulation for value for that amount. The next month the *ad damnum* of the libel was raised to substantially the amount proven and admitted at this hearing. Several months later the claimants and owners filed their answer, claiming limitation and asserting a value of \$60,000.

No effort was ever made to re-seize the vessel or get further security. There never was an appraisement of the

vessel herein, and no evidence as to her value has been introduced by the parties who now object to a \$60,000 valuation. So far as opinion evidence goes it is all to the effect that \$60,000 was her value; the acts of the objecting parties confirm that view. The history of the vessel is that she was first the *Zaandam* of the Holland-American Line, then the *Styria*, and finally about ten years before this disaster, the *Julia Luckenbach*. These names are so familiar in the records of this Court that judicial notice might almost be taken of the fact that she was a very old vessel, built of iron, which obtained an American registry under the Wreck Statutes, and cost about \$80,000 ten years before her owners valued her at \$60,000.

She was wholly lost at sea about eight months after the injury which gave rise to this litigation, and was then insured for \$100,000. In 1909 Mr. Frank S. Martin appraised her at \$70,000.

On the whole I am of opinion that the evidence is overwhelming that \$60,000 was full value for her in May, 1912. The amount of insurance is evidence of nothing but how large a premium owners were willing to pay to insurers who wanted the money.

In May, 1912, the *Julia Luckenbach* was and had been since May 31, 1911, under charter to the Insular Line.

By that charterparty the steamer was to be placed at the disposal of the charterers on said May 31st, being then "tight, staunch, strong and in every way fitted for the service." The charter also contained the usual provision that the owner should "maintain (the steamer) in a thoroughly efficient state in hull and machinery for and during the service;" and was signed "Estate of Lewis Luckenbach, per Edgar F. Luckenbach, Trustee." By the pleadings it is admitted that the Lewis Luckenbach estate did not own all the steamer, and that the charterparty was made by Mr. Edgar F. Luckenbach on behalf of all the owners. All the owners having been impleaded, have

appeared and made the foregoing admission. The charter-party is therefore regarded as the contract of all the owners through their duly authorized agent and managing owner, Mr. Luckenbach.

The libelant shipped its sugar under a bill of lading issued by the Insular Line. It is admitted that under the findings of the Court heretofore made that bill of lading affords no defense to libelant's demand. It follows that since (as has been found) the loss complained of was caused by unseaworthiness of the *Luckenbach*, existing at the beginning of the voyage from Porto Rico to Philadelphia, the libelant must recover *in rem* up to the stipulated value of the vessel, and obtain the overplus from the Insular Line, which in turn has recourse against the impleaded owners of the steamer, unless said owners can obtain the limitation for which they now move.*

It has been affirmatively shown that the owners of the *Julia Luckenbach* were not privy to, nor had the knowledge of her unseaworthiness. The meaning of these words has been sufficiently considered in *Quinlan vs. Pew*, 56 Fed. Rep., 111.

They failed to use due diligence in keeping their vessel seaworthy, because the competent men whom they employed to supervise and inspect the steamer so failed—within the stringent rules laid down by the Courts. Perhaps it is more accurate to say that their own diligence was unavailing,—under the law.

But it does not follow that because errors, omissions or mistakes were made by their properly selected servants, that they must stand ultimately responsible *in solido*. Primary liability is to be imputed to them, but neither privity nor knowledge is to be so imputed.

*The question whether owners other than Mr. Edgar F. Luckenbach are or are not entitled to limit liability, has not been argued. Owners' counsel have assumed that each owner is ready and able to pay his appropriate fraction of the loss, if limitation as for a single owner is denied. The case therefore is considered as though there were but one owner and he had personally signed the charter party.

It is indeed admitted that owners' liability, should under the statute be limited to the value found, were it not that such owners made a personal contract when Mr. Luckenbach signed the charterparty. From this fact and this alone, under *The Loyal*, 204 Fed. Rep., 930, and *Benner Line vs. Pendleton* (C. C. A., June, 1914), it is confidently urged that limitation must be denied.

Ruling decisions must be followed, as long as their authority is unimpaired, but the frank expression of opinion is a professional right.

I am respectfully but firmly convinced that *The Loyal* (*supra*) was rightly decided, for the reasons given by Ward, J., viz: The owner had not shown absence of privity or knowledge.

But the reasons advanced in the prevailing opinion of Noyes, J., asserted to rest on the language of *Great Lakes Towing Co. vs. Mills Trans. Co.*, 155 Fed. Rep., 11, have led to the judgment entered in *Benner Line vs. Pendleton* (*supra*).

That a shipowner cannot limit for the consequences of his own fault or neglect is elementary, for no such act or omission can be conceived without fixing such owner with either privity or knowledge, or both. That he cannot escape fulfilment of his own contract has been often held (*Richardson vs. Harmon*, 222 U. S., 96, and cases cited), but never until *Benner Line vs. Pendleton* (*supra*) was such a contract as a charterparty considered as a contract preventing limitation.

The *Great Lakes Towing Company* case arose out of a written agreement whereby respondent promised to pay libellant for (*inter alia*) "wrecking or bottom" work. Such work was done to a vessel of respondent's, which nevertheless became almost a total loss; whereupon respondent endeavored to limit payment to the value of the remnant of its vessel. It was held upon abundant au-

thority that the payment of a debt formally contracted for, could not be thus avoided by the contractor.

Every case cited, or to be found before the Great Lakes Towing Company decision, and laying down the doctrine that a shipowner cannot limit for his own contract, shows the same kind of contract, viz: An agreement to pay money, in such wise that an action in debt or assumpsit would have laid therefore.

There is no case before *The Lloyd (supra)* where an owner, free of privity or knowledge, was refused limitation because he personally made a contract which had to be performed *by the ship*; which contemplated and required service by the ship, as a prerequisite to pecuniary reward. Nor indeed in *The Lloyd* such a case on its facts—but the language of the Court (page 322, especially) invites to the belief that signature of an agreement to furnish a ship, not only raises the irrefutable presumption of an agreement to furnish a seaworthy ship (which no one doubts)—but makes the signer liable *in solido* and without limitation for all the consequences of unseaworthiness, even though he employ the best men, spends all the money demanded, and is himself as unskilled in seamanship and shipbuilding as to be personally unable to ascertain the facts which condemn him to liability.

Indeed, it is not even (the Statute of Frauds perhaps aside) why a written agreement or contract is necessary—the same consequences would apparently flow from a verbal charter.

For this doctrine the case relied on (Great Lakes Towing Co. vs. Mills Trans. Co., *supra*) is not authority. To make it so the facts must be inserted. If the libelant in that case had without privity or knowledge of defects furnished an unseaworthy tug, whoseby respondents had received damage, there is nothing in the language of the Court that limitation would have been refused on account of the existence of the contract.

Larkin, B., on a *Crews' Duty*, was of the *Crews* which divided *The Great Lark* Towing Company case. When he referred to it in *Declaration re. Harrow* (supra) he said that the construction of the statute made in that and other cases "harmonious with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, . . . but leaves him liable for his own fault, neglect and omissions." To quote this remark as any of the reasons cited by the master, as justifying the doctrine that every contract without regard to its nature or method of performance, puts the contractor outside the limitation here is (to say the least) singular. The master and crew of a ship when navigating or otherwise managing the vessel are acting as the agents of the owner in the fulfillment of that owner's contract. There is no magic in the word "contract," nor in the office of master; the logical reason why the owner is not deprived of limitation by negligence of master and crew is that he is necessarily fulfilling his contract by deputy, and the very intent of the limitation act is to put a measure on the quantum of liability which the owner acting through well-selected agents must assume. It is necessary for an owner to employ master and crew to navigate his vessel, it is just as necessary for him to employ agents, inspectors, shipwrights and the like to inspect his vessel in order to ascertain her condition before the voyage begins. The same reason should lead to the same result in both cases.

But the matter has been considered before now and in this Court. The petition for limitation of the owners of the *Regatta* was denied by *Bradley, J.* (17 Fed. Rep. 126), because the vessel was unseaworthy. The Court said (page 127), the owners "are chargeable with knowledge of what they might have known and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put. The case

er of a ship cannot be permitted to free himself from an obligation of this character by remaining in ignorance of what it is within his power to know."

The owners of the *Republic* had made no written charterparty; they apparently operated their boat themselves, but if there had been a written charterparty into which to read a warranty of seaworthiness, this language of Benedict, J., is exactly the doctrine of *Benner Line vs. Pendleton*.*

In the Circuit Court of Appeals (61 Fed. Rep., 109), Wallace, J., pointed out that the ground of decision was "an implied warranty on the part of the (shipowner) that the barge was reasonably fit for the service for which she was chartered." This doctrine was not approved of; but in affirming the judgment it was said:

"The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage, an expert possessing skill and experience far beyond his own, and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be a hard construction of the statute which would deprive the shipowner of protection under such circumstances."

Later the same Court laid down as an established rule (*The Tommy*, 151 Fed. Rep., at 573),

*The owners of the *Republic* sold passage tickets, or hired out their barge by the day; that was their business. Why was not every ticket a personal contract, importing a warranty of a seaworthy vessel? Each daily hiring was certainly a charter.

"that where the owner has provided a suitable person or persons as his agent to inspect or provide for the proper equipment of the vessel, he is not deprived of the benefit of the statute limiting liability by proof of negligence of such agents where he has had no notice or knowledge of such negligence or resultant defect."

These citations seem sufficient to justify the assertion that the officers and crew of a ship are not the only agents of an owner who may plunge him into liability, but only to the extent of ship and pending freight; and to show it as old doctrine that an implied warranty of seaworthiness does not of itself defeat limitation.

Yet the Benner Line case puts liability without limitation flatly on the ground of the existence of a contract containing that very implication, for the Court concedes that the owner in that case "thought (his vessel) was in a seaworthy condition at the time she started on her voyage," and does not advert to any evidence whatever tending to show absence of privity or knowledge.

It seems, therefore, that the last judgment of the Circuit Court of Appeals for this Circuit perceives a difference between an implication of seaworthiness arising from soliciting freight or passengers, and the same implication arising from a written charter; and it certainly holds that the ordinary charterparty not only contains an implied warranty of seaworthiness (which is of course), but prevents the maker of said charterparty from even offering to show that said unseaworthiness arose without his privity or knowledge. This is equivalent to holding that every shipowner who signs a charterparty (or perhaps charts his vessel orally) is conclusively presumed to be privy and knowing to every detail of his vessel's construction, equipment or apparatus which may affect seaworthiness.

In the case of *The Loyal* there was no charterparty, but an agreement which permitted, if it did not require, the employment of any convenient lighter. There is nothing in opinion or evidence to show whether the respondent used the same lighter once or many times.

In the Benner Line case the charterparty was for a single voyage, the unseaworthiness developed upon that voyage, and the charter maker was held for the familiar breach. In this case unseaworthiness developed or was discovered on a voyage which began a year after the charterparty was made, and the charter was to endure for three years and seven months.

The *Julia Luckenbach* had made many chartered voyages before disaster overtook her.

It is said that the maintenance clause in the charterparty, viz: The owner's agreement to maintain the steamer "in a thoroughly efficient state in hull and machinery," must in the light of the Benner Line case be construed as an extension of the warranty of seaworthiness at the beginning of the period of hire (admitted to inhere in every charterparty) into a warranty of seaworthiness continuing throughout the entire period of the charter, viz: Three years and seven months.

There could not be a better example of the extraordinary nature of the rule contended for than is afforded by the facts herein.

This charterparty was not a demise; the Insular Line were not owners *pro hac vice*, but within very wide limits they had a right to send the *Julia Luckenbach* wherever they wished. They could decide as to the character of the cargo, and, as has been shown herein, on the character of the cargo largely depends the degree of danger to the vessel.

It is right—and it has never been doubted—that the owner who time charters his vessel thereby binds his vessel

to whatever lawful freight the charterers put in her, and for the safe transportation and delivery of that freight he should hazard his vessel. But to bind himself to an unlimited liability by such charterparty for a period of years is a most extreme contention—and (accepting the Benner Line decision at full value) it depends solely on the meaning to be given to the language of the maintenance clause.

In a case where the demand of the charterers was far less extreme than that here propounded, this question has been considered.

In *Giertsen vs. Turnbull* (Sessions Cases 1907-1908, page 1101) it was held that a series of voyages under time charter did not come within the stages-of-voyage doctrine of *The Vortigern* (1898 Pr., 140) and also that in a time charter "the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charterparty is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including of course the expense of all necessary repairs."

The doctrine of this case has been received without comment or objection by Messrs. Scrutton and Carver.

If one accepts, therefore, the doctrine that a shipowner who charters out a vessel unseaworthy at the commencement of the hiring period is liable without limitation, it is not necessary to hold that the ordinary form of time charter here before the Court contains an implied warranty of seaworthiness extending through the whole period of chartering.

At the time of voyage begun, therefore, the warranty of seaworthiness of the *Julia Luckenbach* had (as between charterers and owners) been exhausted; and there was no

contract between them by which the owners bound themselves absolutely to maintain seaworthiness, and also gave up the benefit of statutes which merely embody many centuries of Admiralty Law.

The motion for limitation is granted.

Oct. 12, 1914.

C. M. HOUGH, D. J.

FILED

JUN 3 1916

JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1915,

No.   178

FIELDS S. PENDLETON,

Petitioner,

against

BENNER LINE,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.

D. ROGER ENGLAR,

Counsel for Respondent.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

No. 1041.

FIELDS S. PENDLETON,
Petitioner,

AGAINST

BENNER LINE,
Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

The respondent opposes the petition in this case on three grounds:

I.

This petition should be denied because of the petitioner's laches in making his application.

This petition is really filed to review a decision which was rendered by the United States Circuit Court of Appeals for the Second Circuit on August 10, 1914—nearly two years ago. The mandate of the Circuit Court of Appeals was handed down

September 4, 1914. Thereafter the case was referred to a Commissioner to fix damages, and after a protracted reference, in the course of which testimony was taken in Porto Rico and elsewhere to prove respondent's damages, a final decree was entered in the United States District Court for the Southern District of New York, in admiralty, on July 22, 1915, in favor of the libellant Benner Line.

Thereafter on July 31, 1915, the petitioner again appealed to the United States Circuit Court of Appeals for the Second Circuit. This appeal was dismissed by the said Circuit Court of Appeals for reasons which sufficiently appear from the record filed on the said second appeal. By a stipulation which is included in the said record (fols. 78, 79), the petitioner abandoned the only assignment of error which raised any question of damages. In view of this stipulation the appeal obviously raised no question which had not been already decided by the Circuit Court of Appeals. Also, the papers which constituted the record on the said second appeal were so incomplete that it was clearly impossible for the Court to have considered the case in any of its aspects. Indeed, on the said second appeal, the present petitioner made no secret of the fact that the appeal was taken principally for the purpose of bringing himself within the doctrine of *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280, 284, and *Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 257-9.

Accordingly, the present application presents the question whether a party who has abandoned by stipulation the only appealable question in a case, may revive his right to apply to this Court for *certiorari* by filing a frivolous appeal to the Circuit Court of Appeals. While the respondent does not question the power of this Court to grant a writ of *certiorari* in a proper case, it respectfully submits

that to do so under such circumstances will be a great encouragement to delay.

In the present case, the petitioner has not only allowed one entire term of this Court to elapse after the decision which he now seeks to review, but he has waited until the very last day of the *second* term on which the present petition could be filed.

Although the decision of the Circuit Court of Appeals for the Second Circuit dismissing the purported second appeal was rendered on March 7th, 1916, and a final decree upon its mandate was entered by the District Court on March 14, 1916, the petitioner took no steps toward filing the present petition until May 22nd, 1916, on which date he served respondent's counsel with a set of typewritten papers including a copy of the petition and a copy of a typewritten brief. The date of such service was exactly two weeks prior to the last day on which this Court would receive petitions for *certiorari* during the present term.

One week later, *i. e.*, on May 31st, 1916, respondent's counsel were served with printed copies of the petition and brief—exactly five days before the day set for the submission of the petition—so that the respondent's counsel have practically only two days in which to consider this case, although there has been a period of nearly two years during which the present application might have been made at any time, upon at least the customary notice.

It is submitted that this long and unexplained delay on the part of the petitioner should be fully considered in determining the merit of his application.

II.

In any event the present application should only be granted upon the filing of a good and sufficient bond to secure the judgment herein.

Shortly after the decision of the Circuit Court of Appeals in August, 1914, hereinbefore referred to, the petitioner transferred a large amount of his property to various corporations which he formed for that purpose, taking in exchange for the property stock in the said corporations. He also transferred a large amount of property to various relatives for a nominal consideration, and has not paid or given any security for the payment of respondent's said judgment.

Respondent has been unable to find any of the said stock or any other property of the petitioner, although for nearly a year it has been making vigorous efforts to do so.

Proceedings have been taken in the States of New York, Connecticut and Maine to set aside the aforesaid transfers, and various attachments have also been issued with a view to seizing some property of the petitioner. Various relatives of the petitioner have also been examined in proceedings supplementary to the judgment and vigorous efforts have been made, without success, to obtain personal service of process upon the petitioner himself, with a view to examining him as to his assets.

The petitioner, in opposing these proceedings taken by the respondent, has referred to his proposed application to this Court for a writ of *certiorari* as a reason why the respondent should be denied certain equitable relief which it has sought to obtain.

In view of the exhibits attached to the petitioner's brief herein, respondent takes the liberty of attaching hereto a copy of an affidavit, marked Exhibit A, filed by the petitioner in a creditor's action now pending in the United States District Court for the District of Maine, wherein it is sought to set aside some of the transfers hereinbefore mentioned. From this affidavit, the Court will note that the petitioner admits having transferred, after the decision of the Circuit Court of Appeals above mentioned, a number of vessels to corporations formed for that purpose without paying or securing respondent's judgment. The petitioner also refers in the said affidavit to the pendency of his second appeal to the Circuit Court of Appeals, and his intention to apply to this Court for a writ of *certiorari*.

If the present petition were granted, that fact could not fail to influence a court of equity in the exercise of discretionary powers, and respondent will undoubtedly be very seriously prejudiced in its efforts to collect the judgment. Moreover, the respondent has already been engaged for two years in vexatious and expensive litigation, first for the purpose of proving its damages, and later in an effort to collect them. It is certainly a great hardship upon the respondent to be left in uncertainty for another year or more as to whether or not it should proceed to collect this judgment. In view of the steps already taken by the petitioner to divest himself of his property, it seems clear that if the respondent should allow the proceedings now pending to lapse until the decision of this Court, the judgment against the petitioner, when affirmed, would be valueless.

This Court has more than once announced the rule that petitions for *certiorari* should be filed promptly, and the wisdom of this rule cannot be doubted.

It is submitted that in the present case not only

is the delay unusually great, but it also imposes unusual hardship upon the respondent, because of the difficulty and expense to which it has been put in its efforts to collect the judgment.

Respondent, therefore, respectfully submits that no relief should be granted to the petitioner except upon his filing a sufficient bond for the amount of the judgment now outstanding against him.

III.

This case presents no conflict between the different Federal Circuit Courts of Appeal nor does it present any doubtful question or any question of peculiar gravity or public importance.

Neither the petition nor the brief herein contains the slightest reference to the real question presented by this case. Both the petition and the brief are devoted to a discussion of the question whether a shipowner can limit his liability for breach of an *implied* warranty of seaworthiness where the warranty is *implied* in the shipowner's personal contract. This question is very interesting, but it has absolutely nothing to do with the present case.

This action was brought upon an *express* written contract which contained an *express* covenant that the vessel should be "tight, staunch, strong and in every way fitted" for the voyage mentioned in the contract. This contract was negotiated by the petitioner and signed with his own hand. The only question presented in this case, therefore, is whether

or not a shipowner who has *himself* signed an *express* written contract to make a vessel seaworthy, can limit his liability for his failure to comply with that contract.

There is certainly no decision in any Circuit Court of Appeals contrary to the decision of the Circuit Court of Appeals for the Second Circuit in the present case. The decision of that Court in the case of *The Loyal* is apparently in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Quinlan vs. Pew* (56 Fed. Rep. 111). Both of these cases, however, relate to *implied* warranties of seaworthiness and, therefore, have no possible bearing on the present case.

Respondent's counsel will make no attempt to argue the present case on the merits at this time, but he feels that the foregoing circumstances should be called to the Court's attention, in view of the fact that they appear nowhere in the petition or in the petitioner's brief, and only appear incidentally in the opinion of Mr. Lacombe, which is appended to the petitioner's brief, marked "Exhibit A".

Mr. Lacombe's present opinion as to the merits of the decision in the case of *The Loyal*, in which he sat as a Judge for the Circuit Court of Appeals for the Second Circuit, is most interesting, and may furnish a very good reason why this Court should review the question decided in *The Loyal* case whenever a petition is filed in a case where that question is involved. It is difficult to see, however, what bearing it has upon the present case.

The only question involved in the present case is whether or not there is any statute which deprives a shipowner of the power to make a valid contract in writing in which he personally and specifically agrees to make a vessel seaworthy. If a shipowner has power to make such a contract, the petitioner certainly made it in this case; and it has been found

both by the District Court and by the Circuit Court of Appeals that he did not fulfill it.

Under these circumstances, it is submitted that the case is covered by the remarks of this Court in the case of *Richardson vs. Harmon* (212 U. S. at p. 106). After construing Section 18 of the Act of June 26, 1884, this Court there said:

“Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts.”

Dated New York, 1st June, 1916.

Respectfully submitted,

D. ROGER ENGLAR,
Proctor for Petitioner.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MAINE.

PROVIDENCE WASHINGTON IN-
SURANCE COMPANY,
Complainant,

AGAINST

THE PENDLETON SHIPBUILDING
& NAVIGATION COMPANY;
PENDLETON BROTHERS, INC.; } Affidavit.
F. S. PENDLETON & Co.; ED-
WIN S. PENDLETON and FIELDS
S. PENDLETON, individually
and as copartners doing busi-
ness under the firm name and
style of PENDLETON BROTHERS
and ALICE L. PENDLETON,
Defendants.

(Filed Jan. 22, 1916.)

COMMONWEALTH OF MASSACHUSETTS } ss.
County of Suffolk

FIELDS S. PENDLETON, being duly sworn, deposes and says: That he is the Fields S. Pendleton mentioned in the above-entitled action, and that he is resident of the Borough of Brooklyn in the Eastern District of New York and is a citizen and resident of said Brooklyn; that the said Pendleton Shipbuilding & Navigation Company was organized

in March, nineteen hundred and three under the laws of the State of Maine, and that your deponent conveyed his interest in the vessels enumerated in schedule "A" of said complaint to said company in January, nineteen hundred and fourteen, in exchange for the capital stock of said company; that such interest in said vessels as was conveyed to Winfield S. Pendleton was and is the property of said company and was made to said Winfield S. Pendleton simply for Custom House purposes, your deponent not retaining said interest in his name for said purpose because his business necessitated his being absent from said New York the greater part of the time; that said deponent has not attempted to avoid service of process, but has been attending to his business in the usual way and during the past three months or more has been to Ohio, Pennsylvania, Rhode Island, Connecticut, Massachusetts, New Hampshire, Maine, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina and the District of Columbia in the prosecution of his said business; that since the first day of January, 1916, he has been in Portland and other Maine towns and cities and on the fifth day of said January was in Belfast, Maine, attending a trial before the Supreme Judicial Court, in which said trial he was a party.

That the assessment of damages in said case referred to in said bill was completed about the twenty-second day of July, 1915; and the matter has now been carried to the Circuit Court of Appeals upon an appeal from the District Court and will probably be reached during the present session; and, from there, an application will be made to the Supreme Court of the United States to have a writ of *certiorari* issued to have said cause carried forward to the said Supreme Court of the United States.

That in consequence of the decision of said Circuit Court of Appeals he was advised by his attorneys, Henry W. Goodrich, Edward S. Dodge and Benjamin Thompson that it was not safe for him to continue business as a member of the partnership of Pendleton Brothers; and that the only safe course to adopt was the formation of a corporation for the carrying on of his said business and for the control of the vessels in which he is interested; and that, in consequence of such advice, he organized the following corporations:

PENDLETON BROTHERS, INC.,
F. S. PENDLETON & CO.,
THE PENDLETON COMPANY,

and since their organization, conveyances of certain vessels and other property has been made to the first two of said above named Corporations and he has taken stock in such corporation in payment of the interest owned by him. That in the formation of the several corporations and the conveyance of property to them and to the aforesaid Pendleton Shipbuilding & Navigation Company there was no intent to hinder or delay the complainant or place the property so conveyed beyond the reach of creditors; and that his interest in the stock held by him in said corporation is as available for his obligations as his holdings in said vessels were before said corporations were organized. That there are stock holders in each of said corporations other than the said deponent, and that there are interests in most of said vessels held by persons not interested in said corporations.

That no property has been conveyed to said The Pendleton Company, but that said company was organized for the purpose of taking over certain vessels now under process of construction and now owned by said Pendleton Bros., Inc.

That at the present time there is a great demand

for shipping, and only a person with large experience in vessel matters and familiar with ports and places to which vessels of the kind referred to in said bill can safely go, and also familiar with the particular vessels so as to know what class of cargo they can safely transport, could with safety attempt to manage or control them.

The appointment of a Receiver by this Court for the purpose of managing or controlling such vessel property, or the controlling of said corporations, would be disastrous to the business of said corporations and also disastrous to the other persons interested in said corporations as stockholders therein, and persons interested in said vessels.

That the profits of said Pendleton Brothers, Inc., have not been drawn by Edwin S. Pendleton & Fields S. Pendleton in the form of salaries and the salaries of said Edwin S. Pendleton & Fields S. Pendleton have not been anticipated by credit slips; and said Pendleton Bros., Inc., has recently purchased three vessels, and now has vessel property in the process of construction.

That such conveyances of real estate and vessel property as was made to Blanche C. Pendleton were made long prior to said August 10, 1914, the date of the rendition of the decision of the United States Circuit Court of Appeals reversing the decision of the District Court, which was in deponent's favor and were made for an adequate consideration and were not made for the purpose of delaying, hindering or defrauding the Benner Line or the complainant.

That the conveyances mentioned in said Bill of Complaint made by this deponent to Winfield S. Pendleton, Edwin S. Pendleton and Alice L. Pendleton were made for a full and adequate consideration and were not made for the purpose of delaying, hindering or defrauding said Benner Line or said complainant.

That the registry, enrollment and licensing of vessels are changed from time to time, depending upon the trade, but that your deponent does not recall any change of hailing port of any of said vessels mentioned in said Bill of Complaint subsequent to the transfer of said vessels.

That your deponent has not, in contemplation of the judgment mentioned in said Bill of Complaint, for the purpose of delaying, hindering or defrauding said Benner Line or said complainant, disposed of any of his stock in said corporations without consideration, nor has he concealed the same from attachment or levy of execution, nor has any attachment of said stock been made. And your deponent further says that Harrington, Bingham & Engler, counsel for the defendant, have been informed and are well aware of the fact that this deponent has substantial holdings in said defendant corporations.

That your said deponent is not heavily indebted and is not insolvent, but has amply property to pay his obligations.

FIELDS S. PENDLETON.

Sworn to before me this twenty-first day of January, nineteen hundred and sixteen.

HAROLD IRVING KLARFELD,
Notary Public.

[L. S.]

JAN 3 1918
JAMES D. MAHER,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1917

No. 178.

FIELDS S. PENDLETON,

Petitioner,

against

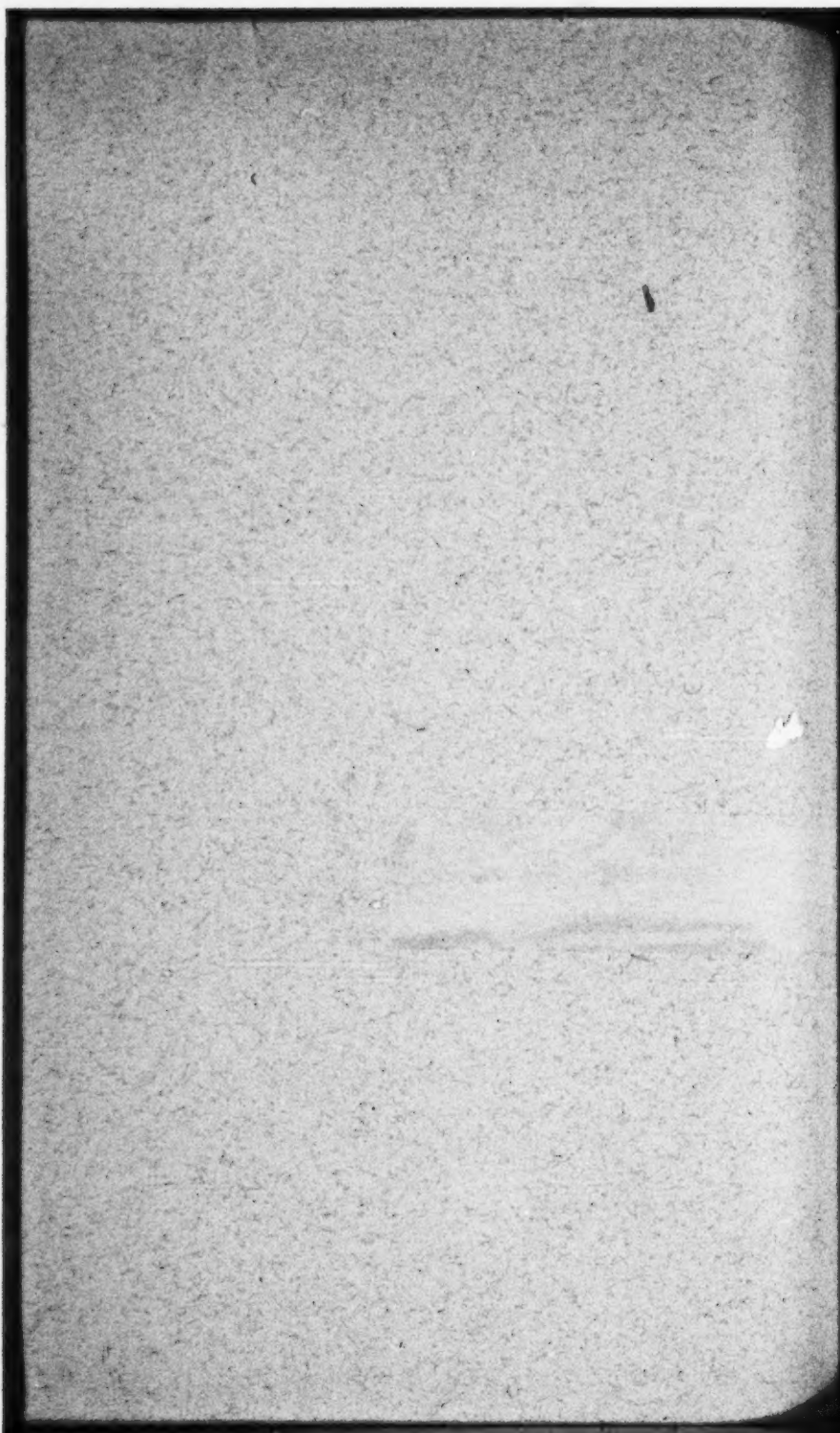
BENNER LINE,

Respondent.

BRIEF FOR PETITIONER.

**E. HENRY LACOMBE,
HARVEY D. GOULDER,
AVERY F. CUSHMAN,**

Counsel for Petitioner.



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Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 178.

FIELDS S. PENDLETON, Petitioner, <i>against</i> BENNER LINE, Respondent.	}
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This cause is before the Court on a writ of certiorari, to the Circuit Court of Appeals for the Second Circuit (Record, page 330), to review its judgments against the petitioner and in favor of the respondent. (*Benner Line vs. Pendleton*, 217 Fed., 497) (Record, page 296.)

Statement of Facts.

On the 7th day of July, 1910, at New York City, the American schooner *Edith Olcott*, duly registered in the New York Custom House, was chartered outright for a voyage from the port of New York to San Juan, Porto Rico, to carry a cargo of lawful merchandise for the lump sum freight of \$3,500 the owners furnishing the ship with officers and crew. The charter party was in writing (Record, page 11) and signed Pendleton Brothers, which was a co-partnership, wholly engaged in the ship brokerage business, composed of the petitioner and his brother. The charter party at the beginning recited:

"This charter party made and concluded upon in the City of New York, the 7th day of July, 1910, between Pendleton Bros., Agents of the Schr. *Edith Olcott*, of the burden of 985 tons or thereabouts, registered measurements, now lying in the Harbor of Perth Amboy, of the first part, and the Benner Line, of the second part;

WITNESSETH, etc."

By what is shown in the evidence to have amounted to a mere incident of carrying on business, it occurred that the petitioner signed the co-partnership name Pendleton Brothers to the charter so made without question, on behalf of the ship and owners. The co-partnership owned none of the vessel, nor did the other member of the firm (the brother of petitioner). The co-partnership of ship brokers in due course of that business and for the usual commission, negotiated the charter party, and in usual course signed it, acting as clearly stated as agents on behalf of the schooner *Edith Olcott* and owners, that is to say all the owners, as the disclosed principals. The petitioner, however, was owner of nine-sixteenths (9/16ths) of said schooner, but did not have and there is nothing to show that in fact or in law he personally had part in negotiating the particular charter, or that in signing the firm name he acted in any relation except as a member of the co-partnership, Pendleton Brothers, which could not and did not pretend to act for any one soever except as agent for the ship and owners. There is no dispute of these facts, but the Circuit Court of Appeals said:

"As the respondent (the petitioner here), the principal owner of the vessel *personally* signed *as his own agent*, he bound himself" (Record, page 306). (Italics ours.)

We are unable to see how the question of part ownership ever came into the case. It was the act of a co-partnership of brokers, and as such done for the named principals, to-wit, the ship and her owners, and is so stated and pleaded in Articles Second and Third of the libel. (Record, pages 2-3.)

The schooner received on board at the Port of New York a cargo of general merchandise, laden by the respondent Benner Line and bills of lading therefor were given by the respondent to various shippers, signed in its own name or by its procurement, or by one of the respondent's officers or by clerks in its office. These were in usual form of contracts of carriage. None of the bills of lading were signed by the petitioner. The lump sum freight reserved in the charter party has never been paid (Record, page 62). The respondent collected certain prepaid freight on cargo (Record, page 61) and by the terms of the bills of lading reserved to itself alone the freight to be paid on a proper landing of the remainder of the cargo at Porto Rico, or other port of destination, and insured its freight and profits on the contemplated voyage, and some of the shippers procured insurance on their goods (Record, page 60). The petitioner and the owners took out no insurance.

On or about the 30th day of July, 1910, the vessel broke ground and started upon her voyage, and on the 7th day of August, 1910, while at sea, was lost with all the cargo.

It has been found by the District Court and by the Circuit Court of Appeals for the Second Circuit that at the time the vessel started on her voyage she was in fact unseaworthy. As to this fact, the Circuit Court of Appeals said:

"We are forced to the conclusion, therefore, that as respects both her hull and her pumps, the vessel was not seaworthy when she began her voyage" (Record, p. 303).

The District Court found unseaworthiness as a fact at the beginning of the voyage:

"In my opinion, under these circumstances, the inference is irresistible that the pumps which failed were not fit to use when the ship started and that therefore the ship was not seaworthy at the beginning of the voyage" (Record, p. 290).

It is not open to dispute, however, that before the vessel entered upon her voyage she was thoroughly overhauled under supervision of a competent man, and due endeavor made by the owners to have her seaworthy in all respects, and it has been accordingly held by the District Court and the Circuit Court of Appeals that the unseaworthiness found, as above stated, was *wholly without the privity or knowledge of the petitioner*, and that petitioner had done everything in his power or that was brought to his knowledge to make the vessel seaworthy "and tight, staunch and strong, and in every way fitted for such a voyage." The finding on this question is expressed by the Circuit Court of Appeals as follows:

"It may be conceded in the case at bar that the respondent thought the *Edith Olcott* was in a seaworthy condition at the time she started on her voyage to Porto Rico" (Record, p. 299).

and by the District Court:

"In my opinion the schooner was not seaworthy at the beginning of the voyage, but such unsea-

worthiness was without the privity or knowledge of the owners" (Record, p. 291).

The above finding of fact in regard to unseaworthiness which we cannot but feel is not borne out by the record, and the finding of absence and freedom from privity or knowledge on the part of the petitioner as to which there is no question, will be accepted by this Court, and these questions of fact will probably not be re-examined, having been passed upon by two triers of the facts.

The *Carib Prince*, 170 U. S., 655;

The *Louisville*, 154 U. S., 657;

The *Abbottsford*, 98 U. S., 440.

Some considerable time after the disaster, the respondent, as bailee, not as charterer to recover a damage or loss of its own under the contract of charter but at the instance and for the advantage of underwriters who had paid losses thereon, filed a libel (Record, page 1) to recover the whole value of the cargo laden on board the schooner *Edith Olcott*. It was demonstrated upon the trial and is evidenced by stipulations found in the record that none of the cargo laden upon the schooner belonged to the respondent, nor was respondent interested therein as the absolute or a beneficial owner (Record, page 321).

The libel set up as the ground for recovery breach of contract in that the charter party provided that the schooner should be "tight, staunch and strong, and in every way fitted for such a voyage," and the claim is that the charter party was *his* personal contract and the petitioner had not furnished a seaworthy vessel at the beginning of the voyage in accordance with *his* contract with the Benner Line.

The petitioner interposed his answer, and, among other things, set up the defenses following:

"Before and at the commencement of the voyage he exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, and if it shall in any way appear that the said vessel was not seaworthy at the commencement of the voyage or thereafter, that such unseaworthiness was without his privity or knowledge, and under the laws of the United States relating to the limitation of liability on the part of the vessel's owners, would be relieved of all liability growing out of the loss of said schooner, and if any liability on the part of this respondent does exist, it is limited to his proportionate part in said schooner as hereinbefore stated" (Record, page 8).

The trial in the District Court resulted, first, in dismissal without opposition of all claims against Pendleton Brothers, the co-partnership, and Edwin S. Pendleton, the respondent's partner. That Court, however, held that Fields S. Pendleton, impleaded as part owner, was entitled to limitation of liability under the provisions of the Act of Congress passed June 26th, 1884, limiting the "individual liability of a ship-owner to the proportion of any or all debts or liabilities that his individual share of the vessel bears to the whole" (Record, page 288, Decision of Holt, J.), and there was found to be no part of the vessel saved and no pending freight, and there followed final decree dismissing the libel (Record, page 292).

It is important to note that appeal was taken by the respondent only from that part of the decree which dismissed the libel as to Fields S. Pendleton (Record, page

293). The Circuit Court of Appeals reversed and directed that the District Court should decree *in solido* against him for all the damage suffered by the respondent as bailee of the cargo lost, denying the limitation provided by the laws of the United States in that behalf.

The Circuit Court of Appeals affirmed the finding of the District Court that the petitioner was *without* privity or knowledge as regards unseaworthiness of the vessel when she started on her voyage. The Circuit Court of Appeals based its decision upon the ground that the charter party, although signed as heretofore stated, by and in the name of a co-partnership of which the petitioner was a member, thereby was also the separate personal contract of petitioner and we must here hold in mind that by consent of Benner Line any right of claim against or liability of Pendleton Bros., the co-partnership who executed the contract, and also as to Edwin S. Pendleton, the other member of the firm, was relinquished and abandoned.

The Circuit Court of Appeals held that the petitioner was bound by his personal contract and was therefore not within the provisions or entitled to the relief accorded to a ship-owner or a part owner under any of the acts of limitation that had been passed by Congress. A portion of the opinion of the Circuit Court of Appeals is as follows:

“If the particular contract is made by the ship-owner in person, it is a matter of no consequence so far as the question now under consideration is concerned, whether it relates to and binds a particular vessel or not; by a personal contract we understand to be meant a contract made by the person or corporation to be bound, as distin-

guished from one imputed to such person or corporation" (Record, page 306).

The District Judge on this point, in dismissing the libel, had used the following words:

"The charter party signed by Pendleton Bros. was a charter party of the particular Schooner *Edith Olcott*. Pendleton Bros. in signing that charter party, acted as agents of the owners. The agreement was the owners' agreement, chartering the schooner, and was an agreement made in the conduct of the schooner. Under such circumstances in my opinion the charter party cannot be regarded as the mere personal contract of Pendleton Bros.; it was the ordinary case of a charter party binding the vessel" (Record, p. 291).

In neither of the holdings nor in any contention that can be made on the point does the petitioner, Fields S. Pendleton, and the Benner Line appear in fact as having a direct personal contractual relation between each other. It is only, therefore, by imputation, quite aside from any act of the parties themselves, that this may be construed in any sense as the personal contract of Fields S. Pendleton, the petitioner, towards the Benner Line. The Benner Line wished to get and did get a charter of the vessel signed by her duly authorized agents, and *Pendleton Bros.* wished to give and did give such charter to the Benner Line. Our thought here in statement is that there never was any contractual relation between this petitioner, Fields S. Pendleton, and the Benner Line intended by either party, and that therefore any and all relations of the petitioner as an individual must come by imputation; and as to this there is no shadow of turn-

ing, throughout all the cases on the subject, that the statutes of limitation apply to relieve from such imputed connection and liability.

It will be hereafter shown that the judge who wrote this opinion (Holt, J.) also decided in the District Court the *Loyal* case, relied upon and referred to at length in the opinion of the Circuit Court of Appeals in this case.

Under the mandate of the Circuit Court of Appeals, the District Court appointed its commissioner, who after hearing the facts duly made his report, which was confirmed by the District Court, and there followed a final decree against the petitioner for the sum of \$44,441.01, on July 22, 1915. From such final decree your petitioner appealed to the Circuit Court of Appeals for the Second Circuit, and upon motion of the respondent that Court dismissed the appeal without a hearing upon the merits, thereby holding that no question was presented other than already decided, and issued its mandate to the District Court, which Court rendered another final decree against the petitioner for the sum of \$46,187.98 on March 14, 1916.

It is to review the two decrees of the Circuit Court of Appeals and to bring up the entire record of the proceedings of said Court that this writ of certiorari has been sought by the petitioner and granted.

Upon the petitioner's appeal, and in the record upon which it was based, there were stipulations (a) that the institution of the suit by the respondent, as bailee, was not at the request of the owners of any of the goods shipped and lost upon the schooner *Edith Olcott*, but solely at the request of the underwriters on the cargo, *i. e.*, underwriters who furnished insurance to the owners

of the cargo or to the respondent; (b) that all of the bills of lading representing the cargo of the schooner that were offered in evidence were signed by the respondent or its employees or by Edwin S. Pendleton and none were signed by the petitioner; (c) that the respondent owned no portion of the cargo shipped upon the schooner (Record, p. 320).

This record also contains a copy of the policy of insurance which was effected upon the cargo by various shippers and issued by the underwriters, who requested the bringing of this suit (Record, p. 321).

Two questions arise on the record:

First, does the Act of Congress, passed June 26, 1884, apply to the facts and circumstances found in this record so as to relieve the petitioner as a part owner in the ship from liability for the loss of the cargo of the Schooner *Edith Olcott*?

Second, may the respondent, Benner Line, suing not for any damages of its own but solely for the damages of others, as bailee, and, if it be of consequence, upon the request of underwriters of such other parties, maintain an action against a part owner of the ship for a breach of a charter party made with it, the Benner Line, and to which the third parties, on behalf of whom the Benner Line sues, were strangers?

FIRST POINT.

The Act of Congress passed June 26, 1884, entitled, "An Act to Remove Certain Burdens on the American Marine and Encourage the American Foreign Trade, and for other Purposes," applies to all debts and liabilities of a ship-owner, whether on contract or in tort, and is not limited to such contracts as are not personal contracts, and especially if such be made in the conduct of a vessel.

It had long been regarded a principle of importance to countries and nations capable of maritime adventure and investment, that these should be encouraged, and in the case of *The Rebecca*, Fed. Cases, No. 11619, Judge Ware questioned if the limitation obtaining on the Continent for so many years might not be regarded as a part of our own law; but, as this Court determined in the case of *The Lottawanna*, 21 Wall., 558, we approached and incorporated this by legislation; precisely as we have covered the subject of limitation of individual responsibility in corporations and as to secondary liability in such ownership, and more broadly in the relief and discharge of personal obligation and liability in the various acts of state legislatures and of the Congress in matters of bankruptcy where the original and the ultimate idea has been relief from personal obligation.

The latest and most comprehensive statement of this general idea of legislation by this Court is *Friend vs. Talcott*, 228 U. S., 37, where the Court held that as the Act extends relief generally a special creditor must bring

his claim within the excepting provisional terms of the general Act.

In 1851 our first statute was passed, found in Revised Statutes 4283 and following (now in Compiled Statutes 1916, Sec. 8021). This law provided matters of procedure which are not involved here and on the instant question provided in Sec. 4:

“The liability of the owner of any vessel for any embezzlement, loss or destruction by any person of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.”

It is open to argument that under this provision the condition of liability of a part owner depended on some personal, direct participation. Note the language giving freedom from obligation, from any loss or damage, without his “privity or knowledge.” As in the present case it has on fullest consideration been held that whatever loss accrued to any person or interest was without the privity or knowledge of the petitioner, it would seem hardly necessary to go beyond the original law of 1851 to argue for reversal of the decree against him as a part owner of the ship.

We may for convenience quote this expression of the Court in the pioneer case *Norwich and New York Transportation Co. vs. Wright*, 13 Wall., 104:

“The great object of the law was to encourage shipbuilding and induce capitalists to invest money

in this branch of industry. Unless they can be induced to do so the shipbuilding interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardness and personal daring and enterprise, but they have no capital. On the other hand, those who have capital and invest it in ships incur a very large risk in exposing their property to the hazards of the sea and to the management of seafaring men without making them liable for additional loss and damage to an inadequate amount. How many enterprises in many manufacturing and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability or from liability except to a limited extent?"

Again, as indictive of the fundamental idea involved in the particular legislation which we shall later trace in the enactment of the law of 1884, the Court said in *Providence and New York S. S. Co. vs. Hill Mfg. Co.*, 109 U. S., 578, at page 588:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interests, the value and importance of which to our maritime commerce can hardly be estimated, nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the Courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before

stated) will be of the last importance. But if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

The ship-owning interest of this country declined steadily, and among other reasons assigned were the responsibilities and liabilities assumed, and along with other cognate questions the particular subject was again dealt with by Congress in 1884. (Ch. 121, Vol. 23, Stat. at large, Sec. 57. Compiled Stat. 1916, Sec. 8028.) No man ever lived who tried to do more for American shipping than the father of this bill, Nelson Dingley. The spirit and the intent of the act was to help ship-owners and to remove all burdens that hindered capital from investment in shipping property. The record of the proceedings is illuminating. So much of the act as covers the question of liability is contained in the 18th section of the law, but it must not be overlooked that Sec. 30 repealed all laws and parts of laws in conflict with the whole Act. Sec. 18 dealing with this subject provided:

"The individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. Provided, that this section shall not affect the liability of any owner incurred pre-

vions to the passage of this act, nor prevent any claimants from joining all the owners in one action, nor shall the same apply to wages due to persons employed by said ship-owners."

The effect has come up in a number of cases to be regarded, however, in reference to the particular facts dealt with therein. In the cases are expressions that the later law may be regarded as an amendment to the Law of 1851; or again that the two are to be read as acts in *pari materia* and so read together as a whole; and throughout the cases the treatment is of Sec. 3 of law of 1851, and Sec. 18 of the law of 1884 without specific reference to the fact that Sec. 30 of the law of 1884 expressly repealed all laws and parts of laws in conflict with that Act.

It has not been decided by this Court that the act of 1884 when it refers to "any or all debts and or liabilities" and provides unequivocally that the individual liability of a ship-owner shall be limited, means that it must be without his privity or knowledge, or that a contract for the performance of a ship must not be personally made; or that the part owner of a ship by entering into a contract for her services becomes *in solido* liable to the performance of that contract at all events and regardless of the limitation of the statute. Such conditions have in more or less desultory way been read into the Act, out of which a somewhat uncertain doctrine has grown up that the Act of June 26, 1884, should be restricted in its meaning and not taken in its ordinary plain sense. There have been holdings that the act, or the contract, or the liability to be limited against must be without the privity of knowledge of the party seeking limitation, with some ameliora-

tion, as in case the act be done exclusively by the master and crew of the ship, or where a liability is imposed by operation of law. This, we submit, shows a tendency to what the Court admonished the lower courts not to do (109 U. S., at p. 588).

Cases arose where the party sought limitation against his personal engagement to pay money, on the faith of which repairs were made, supplies furnished or work, labor or services performed and rendered but when the question first appeared in a Circuit Court of Appeals upon a contract related to the ship and her operation, such as is involved in a warranty of seaworthiness, either expressed or included by operation of law, it was held that this was not a personal contract outside the purview and intention of the limitation law.

Quinlan vs. Pew, 56 Fed., 111.

Later the Sixth Circuit (*Great Lakes Towing Co. vs. Mills Transportation Co.*, 155 Fed., 11) held in reference to a general contract that it was a personal agreement between the parties and so outside the statute, and also laid down a rule of the limitation act to relieve the ship owner from the consequences of extraordinary risks imposed without the limitation by the law of the Admiralty; and defined these as risks arising from the conduct of and contracts made by those who are beyond the personal supervision and control of the owner; yet having legal authority to bind the owner to answer for their conduct or contracts; but where the contract was made directly by the owner, the statute did not apply. Since this decision, however, this court has held that the limitation applies to all contracts or torts, whether imposed by the law

of admiralty or not (*Richardson vs. Harmon*, 212 U. S., 96).

The Circuit Court of Appeals for the Second Circuit followed the narrowing and restrictive construction of the Sixth Circuit and in the case of the *Loyal*, 204 Fed., 930, held that a ship owner was not entitled to a limitation of liability for breach of a personally made contract even though that contract respected the conduct of a vessel to be performed by her. But that also was a case where no particular vessel was named or involved in the contract, unlike the case at bar where the particular ship was chartered. The Circuit Court of Appeals in the case at bar based its decision squarely upon its previous decision in the *Loyal* case.

The whole subject was up for full consideration by the Congress in 1884. The natural, the necessary, difference of opinion was, before Congress, expressed in debates for which we may claim nothing except to show the interest, the trend of thought and the character of question considered by those on whom was imposed the duty of solution. We have, however, the definite action of the committees including the Conference on the exact point here involved. These brought out the question with iteration and reiteration whether, in removing the conceded and self-evident still existing burden as determined to be in furtherance of a desired public benefit and interest, the condition imposed by the inadequate act of 1851 was necessary or advisable and whether it should be retained or repealed and a law established without such qualification or condition.

Excluding, if we must, everything in the nature of debate, we find in those proceedings of the legislative body

which we may undoubtedly consult, clear and definite rejection of such restriction, and, accordingly, in the Act of 1884 clear, positive limitation of liability without condition, and made more manifest, if that were necessary, by express repeal of any laws and parts of laws in conflict.

The value which this Court gives to the report of a Congressional Committee, as an aid to construction, is very clearly brought out in the case of the *Church of the Holy Trinity vs. United States*, 143 U. S., 464.

While the case at bar does not depend wholly on our first point but presents other considerations which might properly impel a decision here in favor of the petitioner, we advance the proposition that the law of 1884 is not by way of amendment of the law of 1851; that it is not necessary to read the two statutes together as forming each a part of a whole, but that the statute of 1884 is sufficient in itself, and covers, defines and governs the right of limitation of liability and stands as the last expression of the Legislature and by Sec. 30 expressly repeals everything in conflict on the subject of the right which had preceded.

We are aware that this would exclude the "privity or knowledge" feature of the law of 1851; and if there be doubt about the intent of the law-makers, we have the state of the law under the Act of 1851, the Title of the Act of 1884, the action of the Committees and the reasons and basis furnished therein, and the amendment proposed and deliberately rejected by the conference committee at the instance of the House members and thereupon receded from by the Senate, is of the most important interest. The language was, "incurred without his personal consent or privity."

Our proposition is that the Act of 1884, in respect of the character and extent of the limitation does not by amendment or correlation add a new element; but in broad terms it positively fixed the limitation and eliminated the condition as to privity or knowledge and even personal consent and, repealing everything inconsistent with the Act of 1884, grants the exemption unequivocally as to every liability of the ship-owner as such, all, of course subject to the proviso of the law of 1884 in relation to liabilities incurred before the passage of the act and certain contracts of employment of sailors. Indeed, the proviso saving from the operation of the statute previously incurred liability and those of a certain character which might thereafter be entered into, is persuasive as a vital consideration here. (See *Friend vs. Talcott*, 228 U. S., 37).

This brings us to a more specific consideration of the law of 1884. We are not unmindful that in *Richardson vs. Harmon* the Court spoke of the absence of intent to repeal but we respectfully submit that the point was not involved and was not argued in that case. Sec. 18 of the Act of June 26, 1884, was an amendment inserted in a bill that had previously passed the House, afterwards known as the Dingley Bill. Separate bills were introduced in the House and Senate. On February 8th, 1884, Senator Frye of Maine introduced S. 1448 by direction of the Committee of Commerce. On January 7, 1884, Mr. Dingley of Maine introduced H. R. 2228. The House Bill was passed April 26, 1884, and went to the Senate. The Senate Bill was debated and amended in various particulars so that at its final passage it included Sec. 18 as hereinbefore quoted, except that it had inserted the words "incurred without his personal consent or privity."

This, as the record shows, became the real subject of consideration and after the two bills hereinbefore referred to had been passed by both houses, there being differences between the bills, a conference was required and had. The records of Congress show that the question was whether this language, "incurred without his personal consent or privity," should be retained as a part of our legislation defining and limiting the liability of a ship owner and aside from the general debate on the subject the report of the conference is found in Vol. 15, Congressional Record at pages 5440-5452:

"Mr. Frye submitted the following report, that the House recede from its disagreement to so much of amendment numbered 4 as proposes a new section numbered 18 and agree to said section as proposed by the Senate with an amendment striking out the words 'incurred without his personal consent or privity' in the first and second lines, and the Senate agrees to the same."

In reference to this action and as evidencing the intent we quote the language of Senator Frye upon the introduction of the bill and upon a following day when it was fully debated in the Senate:

Vol. 15 Cong. Rec. 976.

"Mr. Frye: Section 18 limits the individual liability of a ship-owner for any and all debts and liabilities to the proportion that his individual share of the vessel bears to the whole. That is not so great a change as appears on the face of the law. By statutes to-day any shareholder in a vessel is liable for no more than the value of the share for any tort of the master or in case of collision or in any other way except by contract.

But those provisions of the law are not generally understood. They follow the English and the French law almost word for word. There is to-day a feeling among the capitalists of this country that it is exceedingly dangerous to put capital into a ship where there may be twenty owners and only one of them really a man of wealth, and he responsible for the entire debt contracted. The English have the same limited liability provided for in this section, only in another form. They have a general law of 'limited liability' by which any dozen men desiring to build a ship or a steamer can simply incorporate themselves for that single purpose and then their liability under that act of incorporation shall be the owner's share of the vessel and no more. The bill which we report does the same thing, only in another form. It is believed that it will remove a difficulty under which our capitalists have labored, will give them courage to invest in ships, and will do a great deal more towards encouraging shipbuilding and ship-owning than really the law itself which we report would authorize."

"Mr. Frye: Section 18 touches the individual liability of ship-owners. To-day, except as otherwise provided by statute, in case of collisions, torts, embezzlements, etc., the American ship-owners are simply co-partners. A dozen in the ownership, each a twelfth, or more or less, as ships are owned in our country, are co-partners in the law, and in any contracts that are made, no matter what they may be, each one is held for the whole. This deters many men of wealth from undertaking to build ships. It will be remembered that we are not co-partners in the ordinary association of such. It will be remembered that my share of the ship can be disposed of without the consent of the others. At any day, at any moment,

I can register the bill of sale, and I am no longer a member of the co-partnership, and so every share of the ship may be disposed of without the consent of the other owners. It must be understood, too, that we have no more control of our ships as ship-owners than the stockholders in a great factory have; not so much, because our ship is out of our sight three-fourths of the time. We relieve stockholders in these corporations from any liability beyond their stock simply because they are conducted by agents and superintendents; but your ship is controlled by agents and superintendents, and those ships are out of your sight and out of your reach for months at a time. I believe that that liability should be limited, and it will be a great inducement and encouragement to men of wealth to invest in ships."

and also the remarks by Senator Warner Miller of New York addressed directly to the amendment proposed by Senator Frye to insert the words "without his consent or privity":

Pages 3970-3971.

"Mr. Miller of New York: This a remarkable change. As I understood the sentiment of the committee, it was really to make the ownership in all sea-going vessels a limited liability company in which every individual was liable for only his share. That was notice to the whole world that nothing but the ship was holden. Now, you are going to bring in a clause which would lead to interminable litigation, for some of the owners of the ship will be engaged in the management they will know in regard to the affairs, and they will be held personally liable for everything, while other owners not immediately connected with the

management will escape. The burden will all fall on one or two men, if there is any burden.

"It seems to me that in order to encourage the investment of capital in ship owning we have to do substantially this: We have to make each ship company a limited liability company, and that is notice to everybody. If that is understood to be our law everybody who trusts a ship does it with a full knowledge that there is nothing back of it save the ship itself. Therefore no injustice will be done to anyone. But if the amendment of the Senator from Maine prevails there will be two classes of owners of ships; one class who will have control of the management, will be responsible for everything; and the other class will then take the position of silent partner and will not be responsible."

And it follows that the House refused and the Conference Committee refused the qualification "incurred without his personal consent or privity," and the act of 1884 was passed after full consideration as we find it, after the limitation was clearly and definitely rejected.

This is made the more emphatic by the repealing section 30, and we respectfully submit that such qualification may not properly be judicially read into the plain lines of the statute. (We annex to our brief as an appendix all the debate in the Senate).

This case presents a feature of the law providing limitation of the liability of a ship-owner, for the first time, for decision by this Court. The first act of limitation was enacted 76 years ago (1851), and the one here involved, thirty-three years ago (1884), and yet the question whether or not a ship-owner who has personally made a contract for the working of his ship is entitled to

any relief under these acts has never been directly before this Court. Assuming, but by no means admitting, that such a personal contract is shown to have been made by the petitioner, the question is now here.

It is necessary to clearly see what and what only is the Act to be applied. For years, the Courts below have proceeded upon the assumption that in enacting section 18 of the Act of 1884, the Congress merely intended to include contracts in the general scheme of limitation of liability and did not otherwise change the existing law. Until quite recently it was held by the lower Courts that the two acts read together, applied to Maritime torts and contracts only. But *Richardson vs. Harmon* did away with that holding and decided nothing else. No other question was involved. Quite recently, it has been suggested (*The Benjamin Noble*, 244 Fed., 95), that the Act of 1884 was a complete enactment in itself and repealing the Act of 1851, covers the whole subject of limitation of liability of a ship-owner for torts and contracts on land and sea.

The Act of 1884 we believe was passed by Congress to do just what its title says, to remove certain *burdens* and to *encourage*, and it was deliberately passed having in view more than 30 years of the workings of the act of 1851. That Act had been given a long trial and been found wanting. Shipping was steadily declining. The Congress determined to remove certain known *burdens* and to go farther and encourage. Just as when in 1898, the general business of the country was suffering under the insolvency laws of the States since the expiration of the Bankruptcy Act in 1871, the Congress came to the relief of business and removed the burden of the various

and varied State Laws and encouraged business by enacting the General Bankruptcy Act of that year, so in 1884 Congress passed this section 18. It was a relief act. Just as the Bankruptcy Act provides that any and all provable debts of the bankrupt shall be limited to his assets, so the act of 1884 provides that *any* or *all liabilities* of a ship-owner shall be limited to his assets in his vessel. The Bankruptcy Act has never been held to apply only to *imputed* contracts and torts suffered without the bankrupt's privity or knowledge, yet the words used as indicating from what the bankrupt may be relieved of are provable *debts*, words much less in meaning than *any* or *all* liabilities. Statutes of limitation and of Bankruptcy are intended for relief, they are both acts of relief and to remove burdens and encourage enterprise.

As has been said before, when the Congress in 1884 approached the subject of relief from burdens and encouragement to ship-owners, it had in view the inadequacy of the act of 1851 to accomplish that purpose. The act of 1851 relieved only against torts and only such torts as were suffered without the owners privity or knowledge. In other words, *personal* torts were outside that law, and such partial relief had failed, American shipping was declining. Is it fair to suppose that the mere inclusion of contracts, and only such contracts as were incurred without his privity or knowledge would revive shipping? This question is completely answered when we learn the intention of Congress from the source that this Court has said it can be learned, its journals and records. Those show, unmistakably, that it was the deliberate intention of Congress to remove from the limitation laws relating to ship-owners, any and all questions

of consent, privity or knowledge, and to go farther and repeal the law of 1851 which, after a long trial, had signally failed of its purpose.

SECOND POINT.

The respondent has no standing in law to maintain this action as bailee.

This action brought by the Benner Line is based upon the written charter party. The Benner Line is suing solely as bailee, in other words, as Trustee for the shippers of the goods lost. It is not attempting to enforce any liability or collect any damages for any loss suffered by itself. It had no loss, but on the contrary made money by the loss of the *Edith Olcott* (Record, p. 62). Bearing in mind that it is suing as bailee or trustee upon the charter party, the question first arising is, who were the parties to the charter party? There can be no question but that the two parties were the schooner *Edith Olcott* and the Benner Line. We therefore have this case prosecuted by the Benner Line for the benefit solely of third parties who had no connection whatever and were strangers to the instrument in writing sued upon. The only instrument in writing which connects the shipper of the goods with the schooner *Edith Olcott* is the bill of lading which admittedly was not signed by this petitioner. That being the case, it would seem that the Benner Line cannot maintain this action. The charter party expressly stipulates that bills of lading are to be signed without prejudice to the charter (Record, p. 11). Therefore the

bills of lading are separate instruments and independent contracts between different persons than those executing the charter party.

“A bailment is a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored to the bailee as soon as the purpose of the bailment shall be served.”

In re Allen, 183 Fed., 172.

The question then arises to whom the goods shipped on board the *Edith Olcott* and subsequently lost, were delivered “in trust.”

A good test would be who gave the trust receipt. The bill of lading was unquestionably such a receipt and the respondent was very careful that such bills of lading should be signed or purported to be signed by the master or agents of the vessel and not by the respondent. The vessel then was the bailee of the cargo—there were not two bailees at the same time. It was the owners of the ship, not the respondent, that took the goods “in trust” to transport to Porto Rico and then restore them to their owners or their assigns. It was the owners that agreed to do the transporting for the charter money, not for the freight money that the respondent charged. The respondent was a broker acting for the shippers, and it discharged its duty to the goods and the shippers when it delivered them “in trust” to the vessel and got from the vessel and delivered to the shippers a receipt and contract of carriage or, as it is called, a bill of lading.

If the respondent can maintain any action against the

vessel or her owners it must be as trustee upon request and then its recovery as such trustee would be limited to a recovery of only so much as their *cestui que trust* was entitled to.

“It may be regarded as elementary that when a plaintiff sues in a representative capacity, and for the benefit of another—that is, as trustee for the *cestui que trust* or as bailees for the bailor—his right of action and extent of recovery must be confined to the right of the party for whose benefit he sues.”

U. S. vs. Atlantic Coast Line, 206 Fed., 190,
at page 202.

The bills of lading issued herein for the transportation of the cargo of the *Edith Olcott* were contracts and were the contracts of the Schooner, not of Benner Line, which owned, no vessel.

“A bill of lading is a contract to transport and deliver goods to the consignee upon the terms therein specified.”

John Vitucci Co. vs. Canadian Pac. R. R. Co., 238 Fed., 1005.

“Such an instrument (a bill of lading) is two-fold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt, a bill of lading, in the usual form is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated.”

The Delaware, 81 U. S., 579, at page 601.

“A bill of lading has a two-fold character. It is a contract to transport and deliver the goods to the consignee upon the terms specified in it; and it is also a receipt as to quantity and description of the goods shipped. So far as it embodies the terms of the contract it is not to be varied by parol evidence.”

Vanderbilt vs. Ocean S. S. Co., 215 Fed., 886.

It will be seen by the above citations that the bills of lading were not only “trust” receipts for the cargo, but they were also the agreement with the shippers and owners of the cargo for the transportation and delivery. They were not Benner Line’s agreements, they were the schooner’s agreements. The only thing the Benner Line had to do with the cargo was to receive it on a dock, protect it if necessary to prevent damage while on the dock, deliver it to the schooner *Edith Olcott*, get the receipt and turn it over to the shipper, receive the freight money from the shipper either at the time of the delivery of the bill of lading or at the time of the delivery of cargo. It may have been the legal bailee during the short period that the cargo was on the dock awaiting its loading into the schooner, but just as soon as the goods went on board the schooner Benner Line gave up possession to the schooner, and the schooner became the bailee of the cargo and responsible for the delivery. All the shippers asked the Benner Line to do and all that Benner Line did was to receive that cargo, protect it until it could be loaded in a vessel and give to the shippers a good receipt and contract of carriage by the vessel. This Benner Line did and then as to the goods they became *functus officio*.

But this action was begun at the request of insurance companies—no shipper requested it, therefore no shipper would be liable for any of the expenses, or hoped, or wanted to reap any of the rewards. Yet as the judgment stands Benner Line have not only recovered the loss or claim of the requesting insurance companies but the loss or claims of the non-requesting shippers. The bills of lading are still outstanding in the hands of the shippers. The contracts are still enforceable.

The decrees herein of the Circuit Court of Appeals for the Second Circuit should be reversed and the cause remanded to the District Court with instructions to decree a dismissal of the libel with costs to the petitioner, in all Courts.

E. HENRY LACOMBE,
HARVEY D. GOULDER,
AVERY F. CUSHMAN,

APPENDIX.

H. R. No. 2228 (Congress of Years 1883-1884)

“Although debates may not be used as a means of interpreting a Statute, that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is the history of the period when it was adopted.”

Standard Oil Co. vs. U. S., 221 U. S., 50.

Entitled, “An Act to remove certain burdens on the American Marine and encourage the American foreign carrying trade and for other purposes” was introduced on January 7, 1884, by Nelson Dingley, Jr., of Maine and referred to the Select Committee on Ship Building and Ship Owning, of which Mr. Dingley was a member. January 9th, 1884, the bill was reported from the Committee with amendments.

April 26th, 1884, the bill was debated and passed. The report of the Committee was read.

June 23rd, 1884, the Conference report (of which Mr. Dingley was a conferee) was adopted by the House and the bill passed and signed by the Speaker.

S. 1448

Bill, under the same title as in the House, was introduced on February 8, 1884, by Senator Frye of Maine, who stated that he introduced it by the direction of the Committee on Commerce.

On various days thereafter the bill was debated in the

Senate, and the Senate finally asked for a conference with the House. The conference was granted.

June 21, 1894. The Conference report was adopted and the bill passed by the Senate. The bill as passed by the House did not contain Section 18 (referring to limitation) and this section as passed by the Senate had the words "by his consent or privity" inserted. The Conference report accepted Section 18 as an amendment of the Senate but struck out the words "by his consent or privity," leaving the Section as it is now.

Senator Frye of Maine took charge of the bill in the Senate and there is hereafter given an extract from the Congressional Record, showing what took place in the Senate and in conference between the two Houses, and the final passage by both Houses (Vol. 15, Congressional Record, page 976) :

"Mr. Frye: Section 18 limits the individual liability of a ship-owner for any and all debts and liabilities to the proportion that his individual share of the vessel bears to the whole. That is not so great a change as appears on the face of the law. By statute today any shareholder in a vessel is liable for no more than the value of the share for any tort of the master or in case of collision or in any other way except by contract. But those provisions of the law are not generally understood. They follow the English and the French law almost word for word. There is today a feeling among the capitalists of this country that it is exceedingly dangerous to put capital into a ship where they may be twenty owners and only one of them really a man of wealth, and he responsible for the entire debt contracted. The English have the same limited lia-

bility provided for in this section, only in another form. They have a general law of 'limited liability,' by which any dozen men desiring to build a ship or a steamer can simply incorporate themselves for that single purpose and then their liability under that act of incorporation shall be the owner's share of the vessel and no more. The bill which we report does the same thing, only in another form. It is believed that it will remove a difficulty under which our capitalists have labored, will give them courage to invest in ships, and will do a great deal more towards encouraging shipbuilding and ship-owning than really the law itself which we report would authorize."

At page 3650:

"Mr. Frye: Section 18 touches the individual liability of ship-owners. Today, except as otherwise provided by statute, in case of collisions, torts, embezzlements, etc., the American ship-owners are simply co-partners. A dozen in the ownership, each a twelfth, or more or less, as ships are owned in our country, are co-partners in the law, and in any contracts that are made, no matter what they may be, each one is held for the whole. This deters many men of wealth from undertaking to build ships. It will be remembered that we are not co-partners in the ordinary association of such. It will be remembered that my share of the ship can be disposed of without the consent of the others. At any day, at any moment, I can register the bill of sale, and I am no longer a member of the co-partnership, and so every share of the ship may be disposed of without the consent of the other owners. It must be understood, too, that we have no more control of our ships as ship-owners than the stockholders in

a great factory have; not so much, because our ship is out of our sight three-fourths of the time. We relieve stockholders in these corporations from any liability beyond their stock simply because they are conducted by agents and superintendents; but your ship is controlled by agents and superintendents, and those ships are out of your sight and out of your reach for months at a time. I believe that that liability should be limited, and it will be a great inducement and encouragement to men of wealth to invest in ships.

Mr. Brown: To what is the liability limited?

Mr. Frye: To the extent of the amount owned, the same as in a corporation."

At pages 3970-1:

"Mr. Frye: I move to amend Section 18 by inserting in the first line of the section, after the word 'ship-owner,' the words 'incurred without his personal consent and privity.'

Mr. Hoar: How will it read then?

The Chief Clerk: That the individual liability of a ship-owner, incurred without his personal consent or privity, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole.

Mr. Miller, of New York: This is a remarkable change. As I understood the sentiment of the committee, it was really to make the ownership in all sea-going vessels a limited-liability company in which every individual was liable for only his share. That was notice to the whole world that nothing but the ship was holden. Now, you are going to bring in a clause which would lead to interminable litigation, for some of the owners of the ship will be engaged in the management, they will know in regard to the affairs, and they will

be held personally liable for everything, while other owners not immediately connected with the management will escape. The burden will all fall on one or two men, if there is any burden.

It seems to me that in order to encourage the investment of capital in ship owning we have to do substantially this: We have to make each ship company a limited-liability company, and that is notice to everybody. If that is understood to be our law everybody who trusts a ship does it with a full knowledge that there is nothing back of it save the ship itself. Therefore no injustice will be done to anyone. But if the amendment of the Senator from Maine prevails there will be two classes of owners in ships; one class, who will have control of the management, will be responsible for everything; and the other class will then take the position of silent partner and will not be responsible.

Mr. McPherson: Will the Senator from New York yield to me for a moment?

Mr. Miller, of New York: Certainly.

Mr. McPherson: Let us carry out the proposition of the Senator from New York to its logical conclusion. Suppose, for instance, two ships on the ocean or in the port of New York sail about the harbor or elsewhere. One of them collides with the other, is entirely at fault, and both ships are sunk. How are the injured owners of the ship that has been sunk by reason of the fault of the other, which is also sunk by the same collision, to get redress? Where are they to seek redress? I ask the Senator from New York that question.

Mr. Miller, of New York: I beg the Senator's pardon; my attention was distracted and I did not hear his question.

Mr. McPherson: I will state it again. Where

two ships collide and one ship is at fault and both are sunk in the collision, I wish to know where redress is to be sought. Suppose the ship not at fault is worth six times as much as the other, where is the redress?

Mr. Miller, of New York: There will be no redress beyond the value of the ship.

Mr. McPherson: The ship is sunk; what is her value then?

Mr. Miller, of New York: She would get the marine insurance, I suppose.

Mr. McPherson: Suppose she is not insured?

Mr. Sherman: It seems to me that this is a much more important matter than the Senator from New York thinks. If somebody has been at fault in the management of a ship, there ought to be a liability certainly to the full extent of the man's property. There ought to be a liability criminal as well, and there ought to be a liability personal to fully cover the value of the ship lost. If this bill is in a condition where there is no liability for torts or wrongs committed by the managers and controllers of a vessel, I think it is an important consideration. For the ordinary hazards of the sea, for the ordinary accidents of life, the owners of a ship may not be held responsible; but if accidents and torts have been brought about by their wrongful action, they ought clearly to be responsible. It seems to me that if the bill does not provide for that, it ought to be amended.

Mr. Miller, of New York: For any wrong committed, any negligence, or anything of that kind, the parties would, of course, be held liable under the law. This does not affect that in my judgment.

Mr. Conger: This provision in the bill follows the usual law of all the European nations, that in

the case of damage to a vessel the party without wrong of his own shall be liable only for the value of the vessel and the freight.

Mr. Sherman: Suppose a tort?

Mr. Conger: This provision does not apply to that.

Mr. Hoar: Will the Senator pardon me while I read a sentence from the Revised Statutes?

'Sec. 4282. The liability of the owner of any vessel, for any embezzlement, loss, or destruction by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.'

The liability is not to the value of the vessel, but it is the value of the interest of such owner.

Mr. Conger: The owner's interest is the interest in the value of the vessel before the damage was committed. That has been so construed by the courts universally. It is the interest in the vessel just prior to the time when the collision took place.

Mr. Hoar: Now, if the Senator will pardon me, this section is 'That the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities'—not the particular debt, but all existing debts or liabilities—'that his individual share of the vessel bears to the whole.' Is not that an almost impossible burden

to put upon the claimant to prove the individual interest? Is he to have the duty of ascertaining how many debts there are and what proportion this man's interest bears? Is there any such rule as that?

Mr. Conger: Would it not be unjust to the owner if he should be mulcted over and over again, beyond the value of his interest?

Mr. Hoar: Then abolish individual ownership altogether.

The President *pro tempore*: Senators will please suspend. The Chair thinks it his duty to remind the Senate that by unanimous consent debate was to terminate at 5 o'clock on this bill and amendments. The question is on the amendment proposed by the Senator from Maine.

* * * * *

Mr. Vest: The intent is to protect the shipowner when the captain is in control of the ship thousands of miles away. We did not suppose he should give bonds to the extent of a million of dollars, but only to the amount of his proportionate interest or ownership in the vessel, and of course as he is there individually and knows where the damage is committed and is a party to it, he ought to be held to the full amount of the damages.

Mr. Miller, of California: Why is not the provision in the Revised Statutes as it stands now sufficient?

Mr. Vest: It does not apply to contracts at all, only to torts."

Referring to the Congressional Record, pages 3972-3, in H. R. bill 2228, we find the first nine sections of the act to remove a burden from American shipping was identical with Senate bill 1448. The Senate amended H. R.

2228 by striking out certain sections of the House bill and amending it by inserting certain sections of the Senate bill, one of which was Section 18, as reported upon by the committee, as herein quoted.

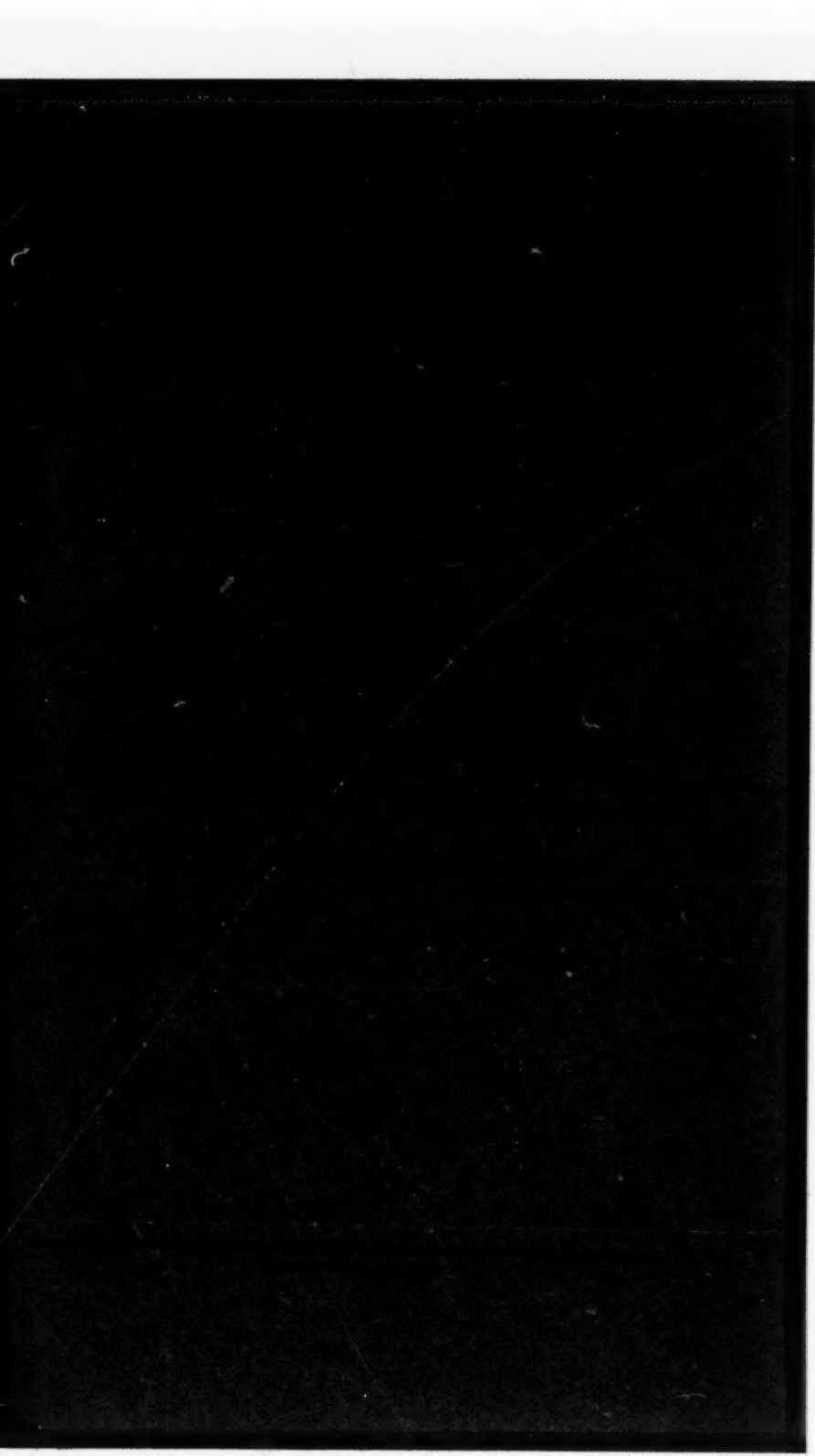
At page 3974 the Senate passed Senate Bill 1448, House Bill 2228, as amended by the Senate. The bill as passed was then referred to conference committees of both houses.

At page 5440, a message from the House of Representatives, by Mr. Clark, its Clerk, announced that the House had concurred in the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate bill (H. R. 2228) to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade.

Mr. Frye submitted the following report: "That the House recede from its disagreement to so much of amendment number 4 as proposes a new section numbered 18, and agree to said section as proposed by the Senate with an amendment striking out the words "incurred without his personal consent or privity," in the first and second lines"; and the Senate agree to the same.

At page 5452, it will be noted that a proposition was made by Senator Frye to include the words "incurred without his personal consent or privity," and that proposition to so amend section 18 failed and the bill was passed by both houses in the form hereinbefore quoted.





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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 178.

FIELDS S. PENDLETON,
Petitioner,

AGAINST

BENNER LINE,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

This action was brought for breach of a charter party whereby the schooner *Edith Olcott* was let to respondent for a voyage from New York to San Juan, Porto Rico. Although the charter party was stated to be made—

“between Pendleton Bros., agents of the
“schooner”

and this respondent, and was signed in the name of “Pendleton Bros.,” it was actually negotiated and physically signed by the petitioner, Fields S. Pendleton, who was a member of the partnership of Pendleton Brothers and the owner of 9/16th of the schooner. The statement on page 2 of the petitioner’s brief that the petitioner—

“did not have, and there is nothing to show that in fact or in law he personally had part in negotiating the particular charter,” is a clear error. The petitioner testified (Record, fol. 395):

“A. I think I signed the charter party; my recollection is that I made the contract and the terms and everything with Mr. Callaghan, and I think, I am quite positive, I signed it.”

It is undisputed that this charter party was made on behalf of the owners of the schooner; that the petitioner himself owned the majority of the shares and was the managing owner (Record, fols. 388, 398); and petitioner's own testimony shows that he personally negotiated and signed the charter.

The vessel, with her cargo, having become a total loss, this respondent, as charterer of the vessel and bailee of the cargo, brought this action to recover for the value of the cargo. The action was brought at the request of the underwriters on the cargo, who had paid the cargo owners and become subrogated to their rights (Opinion of the District Court, fol. 449; Commissioner's Report, fol. 493; Stipulation, fol. 512).

Both the District Court and the Circuit Court of Appeals held that the *Edith Olcott* was unseaworthy when she set out on her voyage. The District Court held that, as the petitioner did not appear to have been guilty of any personal fault, he was entitled to limit his liability; but the Circuit Court of Appeals rejected his claim for limitation because of the fact that the petitioner had himself personally signed the contract of char-

ter party which contained an express and unqualified agreement that—

“the said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage * * *” (Record, fol. 19.)

The suggestion on page 5 of petitioner's brief that there is no question as to his “freedom from privity or knowledge,” and that this issue has been decided in his favor by both of the lower courts, is a clear error, as appears from the opinion of the Circuit Court of Appeals.

The petitioner's brief raises only two issues, and we shall confine ourselves to answering these. We understand the petitioner to concede that this Court will not reconsider questions of fact with respect to which both of the lower courts have agreed.

So far as the facts are material, they are fully and accurately stated in the opinions of the lower courts, to which we refer.

POINT I.

The Act of Congress of June 26, 1884, is to be construed as an amendment to the Act of March 3, 1851, and subject to the same limitations and qualifications expressed in that Act; and neither of these Acts has any application to the present case.

In the First Point of his brief, petitioner argues that the Act of June 26, 1884, was intended to repeal the Act of March 3, 1851; and that the limitation of liability afforded by the later Act

is not dependent upon the absence of any privity or knowledge on the part of the shipowner.

This question was carefully considered by this Court in the case of

Richardson v. Harmon (222 U. S., 96).

In that case this Court considered the earlier decisions and also the record of the proceedings in Congress, upon which the petitioner lays so much stress in the present case. We quote from the opinion of this Court, as follows (pp. 102, 103):

“The meagre debate which occurred upon this section of the act—an act which included many other matters concerning the shipping interests of the country—if competent at all, throws little or no light as to the meaning which was supposed to be attached to liabilities, as distinguished from claims arising out of contract. There does appear, however, a broad general purpose to put a shipowner in the status of one whose risk on account of obligations arising from the conduct of the master and crew is confined to his proportionate interest in the ship and her freight. No purpose to repeal or qualify any of the terms of the existing liability law is declared, nor is this section declared, in words, to be an amendment of that law. But neither fact is of any marked importance. If the necessary effect be to repeal any part of the former law because of repugnance, that consequence must be declared. So, too, if it be in effect an amendment of the law as it stood, by extending that law to cases not before within it, that effect must be given to it, without any unnecessary disturbance of the qualifications or procedure under the former law.”

After a full review of the authorities, this Court held that the Act of June 26, 1884, was to be construed as an amendment of the existing law, and not as a repeal of the qualifications contained in the Act of March 3, 1851.

It may be true that this question was not strictly necessary to the decision in *Richardson v. Harmon*; but it was the principal question considered and decided, and we feel that we can add nothing to the opinion of this Court in that case.

The substance of petitioner's argument is that, in *Richardson v. Harmon*, this Court did not give sufficient weight to the debates in Congress and the proceedings of the Conference Committee with respect to the Act of 1884. The opinion of this Court indicates, on the contrary, that these proceedings were carefully considered. Moreover, it is well settled that such proceedings cannot be considered as a means of interpreting statutes.

U. S. v. Trans-Missouri Freight Ass'n,
166 U. S., 290 at p. 318, and cases
cited.

The situation presented in that case was very similar to the situation in the present case. The fact that amendments to the Act of July 2, 1890, expressly including transportation, had been rejected, was cited in support of the defendants' argument that this subject-matter was not intended to be included in the Act as finally passed. This argument was rejected for the reasons stated in the opinion (pages 318, 319).

The *Freight Association* case is interesting also in another aspect. After reviewing the history of the Act under consideration, this Court said (at page 318):

"All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this Act, as we determine the meaning of other acts, from the language used therein."

This language very aptly describes the situation in the present case. An examination of the debates contained in the appendix to petitioner's brief discloses an extreme diversity in the views of the various senators; and shows further that some of those who expressed themselves with respect to the bill in question had no very clear idea of its effect.

Mr. Miller of New York, who at first objected to the amendment inserting the words "incurred without his personal consent and privity," later conceded (page 36 of petitioner's brief) that a shipowner would, as a matter of course, "be held liable under the law" for any wrong or negligence of his own.

Mr. Conger (page 37 of petitioner's brief), assumed that the interest to which the shipowner's liability would be limited was his interest in the value of the vessel before the damage was committed—an impression squarely contrary to the interpretation given to the Acts of 1851 and 1884 by the courts.

Mr. Vest explained that "the intent is to protect the shipowner when the captain is in control of the ship thousands of miles away"; and in reply to an inquiry by Mr. Miller of California, as to why the existing provisions of the Revised Statutes were not sufficient, Mr. Vest said: "It does not apply to contracts at all, only to torts." Furthermore, the Congressional Record, imme-

diately following the last remark of Mr. Vest (quoted on page 38 of petitioner's brief), shows that Mr. Frye's proposed amendment was put to vote and adopted by a large majority. Accordingly, the net result of all the debate quoted in the appendix to petitioner's brief was the adoption of the very qualification which was contained in the Act of 1851 and which the petitioner claims Congress did not intend to carry forward into the Act of 1884. The remaining quotations from the Congressional Record appended to the petitioner's brief, cast absolutely no light on the reasons why Mr. Frye's amendment was finally abandoned in conference. The only reasonable presumption is that it was considered unnecessary, as the courts have since held.

The emphasis laid by the petitioner on section 30 of the Act of June 26, 1884, is wholly unwarranted. This section merely contains the ordinary formal language commonly added at the end of similar statutes, and can have no material bearing on the interpretation of the Act. It is well settled that

"when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both."

Frost v. Wanie, 157 U. S., 46, at p. 58.

U. S. v. Lee Yen Tai, 185 U. S., 213, at pp. 221, 222.

The petitioner's argument is wholly unsupported by authority. The only suggestion of such authority is contained in the following passage in petitioner's brief (page 24):

“Quite recently, it has been suggested (*The Benjamin Noble*, 244 Fed., 95), that the Act of 1884 was a complete enactment in itself and repealing the Act of 1851, covers the whole subject of limitation of liability of a ship-owner for torts and contracts on land and sea.”

An examination of the opinion in the case of *The Benjamin Noble*, discloses that the suggestion in question was made by counsel and promptly overruled by the Court, which said:

“It is stated that this question is pending in the Supreme Court in the case of *Benner Line v. Pendleton*, *supra*; but we are disposed to follow the decision in the *Great Lakes Towing Case*” (p. 100).

For more than a quarter of a century, the two Acts under consideration have been considered *in pari materia*, and the Act of 1884 has been repeatedly construed as subject to the same qualifications expressed in the Act of 1851. In the present case, it did not occur to the petitioner to question this well settled construction of the Act of 1884, until the case reached this Court. Having failed on all other issues, he now seeks to reverse a series of decisions so numerous and unanimous that he apparently deemed it useless to question them in the lower courts.

If there is anything in the doctrine of *stare decisis*, we submit that it should be applied in the present case.

If the Court were disposed to reconsider this question, it would not fail to test the petitioner's contention by considering the results to

which it might lead. The owner of a small interest in a yacht, when navigating her personally, might wantonly sink with her another craft of far greater value, and escape all liability beyond the amount of his small individual interest.

This petitioner might have sent the *Edith Olcott* out to sea with full knowledge of her unseaworthy condition, and with the deliberate purpose to destroy her cargo; and yet he would be immune from liability. Indeed, if Section 18 of the Act of June 26, 1884, were to be literally construed, the master of a vessel in which he owned a small interest might, with impunity, misappropriate a cargo worth many times her value. The effect of the Act, if construed literally, would be to create a privileged class of persons embracing all those who owned any interest in vessels.

In another aspect, however, this class of persons would be subject to a serious disability. They would be unable to make a valid contract by the terms of which they assumed any liability beyond the value of their interest in the vessel. The owner of a vessel, in consideration of a high freight rate, might wish to make an agreement with the shippers of cargo that he would carry insurance on the cargo. Such an agreement, however, would be invalid beyond the value of his interest in the vessel. Similar cases might be multiplied indefinitely.

Once it is decided that the petitioner's right to a limitation of liability is dependent upon the absence of any "privity or knowledge" on his part, the case becomes comparatively simple. As we have already pointed out, the petitioner

was the managing owner of the vessel, and he personally signed the contract. The fact that he signed it in the name of the partnership, of which he was a member, as "agent" for himself, certainly cannot affect his relation to the contract. As pointed out by the Circuit Court of Appeals (fol. 482).

"As the respondent, the principal owner of the vessel, personally signed it (the charter party) as his own agent, he bound himself."

Accordingly, this is a case where the managing owner of a vessel personally negotiated and signed a contract which expressly provided that the vessel should be seaworthy. The vessel was not seaworthy. The case, therefore, presents a very narrow issue, i. e., what is a "personal contract" within the meaning of the decisions holding that a ship owner cannot limit his liability upon his own personal contract? The leading cases on this subject are *Great Lakes Towing Company v. Mills Transportation Company* (155 Fed. Rep. 11), decided by the Circuit Court of Appeals for the Sixth Circuit, and *The Loyal* (204 Fed. Rep. 903), decided by the Circuit Court of Appeals for the Second Circuit.

In the *Great Lakes Towing Company* case a petition for limitation of liability was filed by the *Mills Transportation Company* which had made a contract with a *Towing Company*, whereby the said *Towing Company* agreed to perform all towing and wrecking services required by the vessels of the petitioner at certain stated prices. One of petitioner's vessels

having stranded, the Towing Company was called on, pursuant to the said contract, and sent a tug with wrecking apparatus to the assistance of the stranded vessel, where it spent several days in pumping and attempting to get her afloat, but without success. The stranded steamer having become practically a total loss, the petitioner claimed the right to limit its liability to the small salvage recovered from the wreck. The limitation was denied. The Circuit Court of Appeals held that the Act of 1884 was intended merely as a supplement to the Act of 1851. After stating certain reasons which supported its conclusion, the Court said (at pages 15, 16):

“But we think there are other reasons of sufficient weight to lead to the conclusion that the act of 1884 was not intended to have application to liabilities of the owners of vessels for the consequences of their personal faults or of obligations personally contracted by them. The purpose of Congress, was, as we think, to relieve the shipowner from the consequences of those extraordinary risks which were imposed without limitation by the law of the admiralty as that law had been interpreted in this country. And by extraordinary risks we mean those risks arising from the conduct of, and contracts made by those who are beyond the personal supervision and control of the owner and yet have legal authority to bind him to answer for their conduct or contracts; or, to express the thought in another way, that the liabilities intended by this legislation were those peculiar to him as a shipowner and had been imputed to him because of his relation

to the ship, and not those liabilities whether for torts or from contracts, which spring from his own personal conduct or stipulations. It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about any thing else and would be enforced in the courts in common-law actions. It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs, or be given such an immunity as to make his stipulations of uncertain value."

In the case of *The Loyal*, a Lighterage Company contracted to do all the lighterage for an importer for a fixed period of time. Because of the unseaworthiness of one of the lighters, her cargo was endangered and was rescued by salvors who thereby became entitled to salvage compensation. The owner of the cargo pleaded the Lighterage Company, which sought to limit its liability to the value of the lighter. The Circuit Court of Appeals for the Second Circuit held that the contract was the personal contract of the Lighterage Company; that the implied warranty of seaworthiness contained in the contract was equally personal; and that the Lighterage Company could not limit its liability for breach of this warranty.

In the course of its opinion the Court said (at page 932):

"A vessel-owner is not entitled to limit his liability upon his personal contracts. The distinction between those contractual obligations which the owner of a vessel assumes

himself by entering into them and those which are imputed to him for the acts of others on account of his ownership of the vessel, is well settled and is clearly pointed out in the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company v. Mills Transp. Company*, 155 Fed., 11, 16, 83 C. C. A., 607, 612" (22 L. R. A. (N. S.) 769." * * *

"The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, just as much the personal contract of the vessel-owner as the express contract itself. It was precisely as if written in the contract. The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others."

In *The Loyal* case, Judge Ward, although concurring in the result, dissented from the reasoning by which the majority of the court reached the conclusion that the vessel owner could not limit its liability upon the implied contract of seaworthiness. His dissent, however, appears to have been based solely upon the ground that the warranty of seaworthiness was implied and was not expressed in the contract. Judge Lacombe appears to have felt some difficulty on the same ground. In this case, however, the contract to make the vessel seaworthy is express, and such difficulty as may have been presented in *The Loyal* does not exist here.

The same may be said of *Quinlan v. Pew* (56 Fed. Rep., 111), from which Judge Ward quotes in his opinion in *The Loyal*. The only question which the court had before it in that case related

to an implied warranty of seaworthiness; and the language of the court was directed to such a warranty. While *Quinlan v. Pew* is perhaps inconsistent with the decision in *The Loyal*, it is not an authority in favor of the petitioner in the present case. Even if the Circuit Court of Appeals for the First Circuit had attempted to decide the present question in *Quinlan v. Pew*, its remarks would have been mere *dicta*; but it sufficiently appears from the opinion that the court did not intend to pass upon that question. The following extracts from the opinion are significant under this head:

“Whether, where the owner undertakes personally to do this duty, he is to be charged for the lack of the extremest care possible, or takes the hazard of overlooking some things which the utmost scrutiny might discover, or whether acting with ordinary good faith, he will be relieved, provided the defect in question did not come to his attention, we are not now required to determine.

• • •

“That there may be certain contracts, relating not so much to the navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may be well contended, without at all touching the principles here involved.”

The history of the case of *Great Lakes Towing Company v. Mills Transportation Company* has an important bearing upon the present issue. An application for certiorari was denied by this Court (207 U. S., 596). Thereafter the case was cited with approval by this Court in the case

of *Richardson v. Harmon* (222 U. S., 96, at p. 106). It is significant that the opinion of this Court in the latter case was written by Mr. Justice Lurton, who, as one of the Judges of the Circuit Court of Appeals for the Sixth Circuit, took part in the decision of the *Great Lakes Towing Company* case. In view of this fact it may be assumed that Mr. Justice Lurton had in mind not only the decision in the *Great Lakes Towing Company* case, but the principles which the Court there laid down in the course of its opinion. If there were any doubt on this point, however, it would be removed by the following extract from the opinion of this Court, which follows immediately after the sentence in which the *Great Lakes Towing Company* case is quoted (p. 106):

“Thus construed, the section harmonizes with the policy of limiting the owner’s risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts.”*

It is perfectly plain from the foregoing quotation that this Court has considered and passed upon the very question involved here. The most that can be said is that the point was not strictly necessary to the decision in the case then before the Court.

Even in the absence of authority, however, it seems perfectly clear that the breach of the owner’s contract in this case cannot be said to have occurred

*The italics are our own.

“without the privity or knowledge of such owner or owners.”

The fact that the owner has personally entered into the contract to make the vessel seaworthy is sufficient to establish his privity; and if privy to the undertaking, he is necessarily privy to the breach thereof. The law affords no standard of diligence by which the owner's obligation may be measured; having personally contracted to make his vessel seaworthy, he can plead no excuse short of legal impossibility.

That Judge Noyes had this principle in mind in deciding the case of *The Loyal*, clearly appears from the following extract from his opinion (pages 932, 933):

“The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others. It was a contract from which the owner could not obtain immunity by the limitation statute, and this whether the breach of the contract was caused by the owner's acts or those of its agents. *We are unable to accept the contention that a vessel-owner may be relieved from responsibility upon his personal contracts provided he does not break them himself. The making of the contract is enough to place it outside the statute.*”*

It is deemed unnecessary to discuss the earlier decisions—all of which are cited and considered in the opinion of the Circuit Court of Appeals for the Sixth Circuit in the *Great Lakes Towing Company* case.

*The italics are our own.

It may be pointed out, however, that the principle upon which the respondent relies is by no means novel. As early as 1888 Judge Brown said, in *The Amos D. Carver* (35 Fed. Rep., 665, at page 669):

“The act of 1884 limiting the liability of the owners of a vessel on account of the same, does not, I think, restrict the liability of owners upon their own personal contracts, but only their liability ‘on account of the vessel’; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contracts or acts of the ship, or her master, without the owner’s express intervention.”

Judge Brown steadily adhered to this view and applied it in numerous later decisions. So far as we are aware, the interpretation given to the statute by Judge Brown has never been seriously questioned by any Court; and *The Amos D. Carver* has now been cited with approval by this Court in *Richardson v. Harmon* (*supra*).

The question whether the principle laid down in the *Amos D. Carver* with respect to express contracts, and uniformly followed by the courts since that time, is applicable to implied warranties, is not involved here. That question depends upon very different considerations from the question presented in the present case. In the present case the petitioner signed an express and unqualified agreement to make the *Edith Olcott* seaworthy. If he desired to qualify that agreement he should have done so by inserting an appropriate provision in the charter party. It is really idle to suggest that the present case involves any fundamental prin-

ciple affecting the future of American shipping interests. The present case arises from the fact that the petitioner neglected to insert in his charter party an appropriate provision substituting the obligation of due diligence for the absolute obligation to furnish a seaworthy ship. There are forms of charter party in common use, which contain elaborate provisions fully protecting the shipowner from any liability for latent defects; and the petitioner's misfortunes arose from the fact that he signed a form of charter party which did not afford him the protection to which he now claims that he was entitled. There is no particular equity in the petitioner's demand that the Court, by a strained construction of the law, should afford him the protection for which he failed to stipulate in his contract.

The petitioner's claim is especially lacking in merit by reason of the fact that the charter party upon which this suit is brought was written on a printed form supplied by the petitioner himself. (Record, fol. 18.)

POINT II.

This action was properly brought by the respondent as bailee of the cargo of the "Edith Olcott."

The second point of petitioner's brief really raises a question of fact which has been decided adversely to him by both of the lower courts. Both of these courts found as a fact that the respondent was the bailee of the cargo of the

schooner *Edith Olcott* and entitled to sue as such for the benefit of the underwriters, who had become subrogated to the rights of the cargo owners. (Opinion of District Court, Record, fol. 449; Opinion of Circuit Court of Appeals, Record, fols. 470, 471.)

Indeed, it is difficult to see how any other conclusion could have been reached on the evidence.

The respondent, as appears by the evidence of Mr. Callaghan, maintained more or less regular sailings to Porto Rico, and held itself out to the public as a common carrier; it advertised for and solicited cargoes, and when a sufficient amount was obtained, it chartered vessels to transport them; it provided the dock to which the cargo was delivered, and employed men to put the cargo aboard the vessel; it fixed the freight rates and received the freight upon the shipments; it provided its own form of bill of lading, which, in the ordinary course, was signed at its office by the master or agents of the vessel; the entire space of the vessel was chartered to the respondent, and no one could put goods aboard excepting by virtue of a previous contract of affreightment with it. Petitioner's answer admits (Articles I and V), that respondent is a carrier and that the cargo was received "from the libellant."

In view of these facts, it is difficult to see how it can even be suggested that the respondent was not the lawful bailee of the cargo which had been entrusted to it by numerous shippers. These shippers did not know the owners of the schooner in any way; they knew only the Benner Line, with whom they had made their arrangements for the carriage of their goods.

The right to sue under such circumstances has been constantly upheld in the Admiralty Courts, which have shown the utmost liberality in allowing suits in a representative capacity. The case of *The New York* (93 Fed. Rep., 495, affirmed 113 Fed. Rep., 810), arose on facts almost identical with those of the present case, and is an authority squarely in point. In that case Judge Thomas said (at page 499):

“The carrier is so far the representative of the owner of the cargo that he may sue in his own name for injury to the goods carried. The extent to which this rule may be applied is illustrated in *The Beaconsfield*, 158 U. S., 303, 307, 15 Sup. Ct., 860. Therefore, where the cargo owners may maintain an action *in rem* against the carrying ship, the charterers, who are related to the cargo as carriers, may enforce the lien by an action *in rem*. From this there seems to be no logical escape.”

(It may be pointed out that the foregoing language refers to the facts of the particular case before the court, and was not intended to limit the doctrine there announced to actions *in rem*. It is, of course, well settled that a carrier may sue as bailee in common law courts where actions *in rem* are unknown.)

In the case of *The Beaconsfield* (158 U. S., 303), this Court said (at p. 307):

“It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried.”

The suggestion made by the petitioner in the closing paragraph of his brief appears to have been passed upon in the case of *The St. John* (7 Blatchf., 220; Fed. Cas. No. 12,224, aff. 154 U. S., 586), where the Circuit Court for the Second Circuit said:

“The right of a carrier to maintain an action for damage done to goods in his care, and for the safe and sound delivery of which he is responsible, cannot be questioned. He has such right even at common law, on strict principles. Here, if the claimants deemed themselves entitled to insist that the owners not yet satisfied for their loss should be made parties, they should have sought such relief earlier. On appeal, no such objection will be entertained. Even the master of a vessel is permitted, in admiralty, to proceed for a collision.”

In the present case, if the petitioner had raised the point that the cargo owners should be made parties to the suit, there would not have been the slightest objection, excepting on the ground of trouble and expense. On the contrary, petitioner confined himself to denying, in his answer, that the respondent was a bailee, and on this issue he has completely failed. The evidence certainly leaves no doubt that the Benner Line was a bailee of the cargo and responsible for it to shippers.

It is confidently submitted that the right of the respondent to sue on the facts shown in the present case could be established in any Court, whether State or Federal:

Hardman v. Brett (37 Fed. Rep. 803, at pp. 804, 805);

National Surety Company v. United States (129 Fed. Rep. 70, at page 73);

The Nonpariel (149 Fed. Rep. 521);
United States v. Atlantic Coast Line
R. Co. (189 Fed. Rep. 770, at page
 784).

U. S. Fidelity & Guaranty Company
v. United States (229 Fed. Rep. 397).

Deford v. Seinour, 1 Ind., 532;

Merrick v. Brainard, 38 Barb. (N. Y.),
 574;

Great Western R. R. Co. v. McComas,
 33 Ill., 186;

Galveston, etc., Ry. Co. v. Barnett, 26
 S. W. Rep., 782 (Tex.);

Owners of Steamboat Farmer v. Mc-
Craw, 26 Ala., 189;

Freeman v. Birch, 28 E. C. L., 543;

The Torgorm, 48 Fed. Rep., 584;

Swift, et al. v. Pacific Mail S. S. Co.,
 106 N. Y., 206;

Fry v. Carter & Howell, 25 Ala., 479;

Moran v. Portland Steam Packet Co.,
 35 Maine, 55;

Southern Express Co. v. Heber Craft,
 49 Miss., 480;

Colvin v. Fargo, 47 Misc. (N. Y.), 642.

A bailee can recover the full value of the
 bailed property from a wrongdoer, irrespective
 of the extent of the bailee's liability.

U. S. Fidelity & Guaranty Company v.
United States (*supra*).

The weakness of petitioner's position is well
 illustrated by his argument that "the vessel of
 the defendant was the bailee of the cargo—there
 were not two bailees at the same time." Both

of the statements contained in this sentence are unsound.

No inanimate object can occupy the position of a bailee, which is a relation involving trust and confidence; and vessels are no exception to this rule.

The implication that there could not be two bailees of the same property at the same time is equally fallacious. Express companies and other forwarders frequently ship goods entrusted to them over the usual railroad and steamship lines, taking an ordinary bill of lading, like any other shipper. In such a case, the express company or forwarder is the bailee of the property as to the original shipper; while the railroad company or steamship line is the bailee of the property as to the express company or forwarder. We do not see, however, that this question has any bearing on the present case, as here there was only one bailee, *i. e.*, the Benner Line. Neither the schooner *Edith Olcott* nor this petitioner was the bailee of the property in any sense of the word.

The suggestion that the shippers might make some claim against the petitioner under the bills of lading is wholly without merit—quite apart from the fact that the statute of limitations has run against any such claim. It is undisputed that the underwriters, who requested this suit, have paid for the cargo and thereby became subrogated to the rights of the owners of the property. Accordingly, any action brought by the owners of the property could be brought only for the benefit of the very underwriters whose claims will be satisfied by the payment of the judgment in this case.

“Inasmuch as the law does not allow a defendant to be vexed twice for the same wrong, a recovery by the person having a special property, and satisfaction by the wrong-doer, discharges the latter from all liability to the owner. *White v. Webb*, 15 Conn., 305; *Smith v. James*, 7 Cow. 328; *Harker v. Dement*, 9 Gill. 7.”

Hardman v. Brett (supra).

The bills of lading, of course, were not negotiable instruments in the sense that a transfer of these documents would cut off any equities existing in favor of the persons who issued them. Accordingly, no purpose would have been served by making all of the shippers, consignees and underwriters, who might be interested, parties to this suit; and no such suggestion was made in the petitioner's answer or in the courts below. The addition of these parties would very much have increased the trouble and expense of the trial; and for this reason, the suit was brought in the name of the bailee who had the custody of the cargo and who made the contract for its transportation.

The fact that the petitioner did not personally sign the bills of lading is immaterial. In ordinary course, the bills of lading would have been signed by the master, and in signing them the master would have been acting as the agent of this respondent, and not of the vessel owner, whose rights and obligations were defined in the charter party. The charter party expressly provides, “the bills of lading to be signed without prejudice to this charter.” The obvious meaning of this provision was that the charterer might make any contract he saw fit with the

shippers; but that these contracts should not affect the rights and obligations of the vessel owner.

It is deemed unnecessary to discuss this question at length, as the only point definitely raised by the petitioner in this connection appears to be that the respondent was not the bailee of the cargo—a question of fact which has been decided in favor of the respondent by both of the lower courts.

POINT III.

**The decrees of the Circuit Court of Appeals
herein should be affirmed.**

Dated, New York, January 12, 1918.

Respectfully submitted,

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent.

D. ROGER ENGLAR,
Advocate.

PENDLETON *v.* BENNER LINE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 178. Argued March 11, 12, 1918.—Decided March 25, 1918.

Liability over is the reason for a bailee's right to recover the full value of the goods,—a reason which, whatever its inadequacy in history or theory as applied to torts, applies with real force to contract relations like those in this case.

A transportation company, holding itself out as a common carrier by sea, received consignments of goods, fixed and collected the freight, loaded the goods on a vessel which it chartered for their carriage, and issued bills of lading to the shippers signed by the master or agents of the vessel. The vessel proved unseaworthy and the cargo was lost. *Held*, that the company was liable over to the owners of the cargo and by subrogation to the insurers, and could recover its full value from the vessel owners under their express warranty of seaworthiness, in the charter party, even if technically the possession of the cargo was with the vessel owners.

The Act of June 26, 1884, c. 121, 23 Stat. 57, does not limit the liability of a ship owner upon his personal warranty of seaworthiness.

A charter party, containing a warranty of seaworthiness, purported to be entered into by a firm as agents of the vessel, but was signed in the firm name by one of its members who was part owner. *Held*, that the warranty was his personal contract.

An owner is liable on his express warranty of seaworthiness whether to blame for the breach or not.

217 Fed. Rep. 497, affirmed.

THE case is stated in the opinion.

Mr. Harvey D. Goulder and Mr. Avery F. Cushman, with whom *Mr. E. Henry Lacombe* was on the brief, for petitioner.

Mr. D. Roger Englar for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel brought by the Benner Line against the Pendleton brothers upon a charter party purporting to be made between "Pendleton Bros., agents of the schooner 'Edith Olcott'" and the libellant, and signed "Pendleton Brothers." The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage and that by reason thereof she sank and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side. As one of the Pendleton brothers was not interested in the vessel he was dismissed from the suit without objection. The other, the petitioner, who signed the firm name, being a part owner, was held by the District Court to be bound by the warranty of seaworthiness contained in the contract, but entitled to the statutory limitation of liability. Act of June 26, 1884, c. 121, § 18, 23 Stat. 57. 210 Fed. Rep. 67. The Circuit Court of Appeals held that the statute did not cover the case. 217 Fed. Rep. 497. 133 C. C. A. 349. A decree was entered against the petitioner for the total loss. Both Courts agreed that the Benner Line although owning none of the cargo was entitled to sue for the loss of it and this proposition and the matter of the applicability of the Act of 1884 are the two questions argued here.

The ground on which the right of the Benner Line to

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recover the value of the cargo is denied is that the anomalous doctrine by which a bailee can recover the value of goods that he does not own (*The Beaconsfield*, 158 U. S. 503, 507), stands on the bailment, and that here there was no bailment to the Benner Line. The charter party provides that bills of lading be signed without prejudice to the charter. The bills of lading were signed by the master or agents of the vessel (the Benner Line), and, it is contended, bound only the vessel. The charter was not a demise of the ship, and it may be assumed, as the bill of lading seems to assume, that the technical possession of the goods was in the ship owners, since they remained in possession of the ship. The Benner Line has not paid or been called upon to pay anything to the owners of the cargo, but brings this suit at the request of the underwriters on the same, who have paid for the loss.

But as was observed by the Courts below, the Benner Line held itself out to the public as a common carrier, solicited and received the merchandise that it offered to transport, by acceptance of such merchandise contracted to be answerable for the transportation, chartered the vessels to carry what it received, employed the stevedores who put it aboard, fixed and received the freight and signed or had the bills of lading signed in its office. It determined the vessel on which the cargo should go as against the owners of it or of the ship. The cargo went in the space it had hired. We agree with the lower Courts that the Benner Line did not disappear from its contract to carry the goods when the bills of lading were signed and that it would have been answerable to the owners, or to the insurance companies when they became subrogated to the owners' rights, if they had elected to sue it. The owners of the vessel had warranted the seaworthiness of the ship to the charterer, of course in contemplation that a cargo would be shipped as to which they would be liable in some form. Wherever in theory of law the tech-

nical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Ed. IV, 34, pl. 9, is an example of what has been repeated from that day to this. See *Brewster v. Warner*, 136 Massachusetts 57, 59. Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. The whole question is hardly more than technical as there is no doubt that this suit really represents the owners' interests since it is brought at the request of the insurers who have paid the loss.

On the proposition that the petitioner is entitled to limit his liability under the Act of 1884 it is urged that the act is an absolute limit, irrespective of privity or knowledge, in regard to contracts as well as torts, and that this contract, if it bound the petitioner at all, did so only as an indirect result of its execution. The last point hardly is intelligible. The petitioner signed the charter with the name Pendleton Brothers, which included himself, and apart from the fact that although described as agents the Pendleton brothers purport to be contracting parties, if we look only to the principals the petitioner was one of them as part owner of the vessel. The contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship. That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson v. Harmon*, 222 U. S. 96. It was said in that case, p. 106, that § 18 leaves the owner "liable for his own fault, neglect and contracts." The principle was held to

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apply to contracts less personal than this in *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. Rep. 11, and in *The Loyal*, 204 Fed. Rep. 930. We are not disposed to disturb the very strong and deliberate intimations of *Richardson v. Harmon* in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not.

Decree affirmed.

